REPORT
ON
PUBLIC INQUIRIES

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

1992

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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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EXECUTIVE SUMMARY

In its *Report on Public Inquiries*, the Ontario Law Reform Commission concludes that, while public inquiries should be retained, the law governing them should be reformed to protect individuals. Public inquiries have played an important role in the history of both the province and the country as a whole. Although their impact is difficult to judge, they have often dealt with the pressing concerns and controversies of the day, as well as many aspects of the longer term policy agenda. Public inquiries have become an important part of government, distinct from the Legislature, the executive, and the judiciary. However, the activities of two recent Ontario public inquiries have been shaped, and in one case terminated, by judicial proceedings raising questions about the utility and fairness of public inquiries.

The Commission observes that there are, in effect, two kinds of public inquiry; those dealing primarily with policy formulation, and those investigating wrong-doing. It is the latter kind of inquiry that impacts most seriously on a person's rights, and will therefore be most affected by the Commission's reform proposals.

In order to respond to concerns that have been expressed regarding public inquiries, the Commission makes a number of recommendations designed to minimize the prejudice and unfairness that results from the public inquiry process, without impairing the execution of their mandates. The Commission recommends, for example, that, subject to certain exceptions, everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her. The Commission also recommends that where an inquiry believes that a person will be subject to serious allegations of misconduct in public proceedings of the inquiry, the inquiry should give the person notice of such allegations, and that a person receiving such a notice should have a right to respond.

The Commission also makes a number of recommendations that will recognize and protect the independence of public inquiries from the executive and the Legislature, facilitate public involvement, and enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence and participation. Thus, the Commission recommends that if within thirty days of its delivery to the Lieutenant Governor in Council a commission's report has not been tabled in the Legislature or released to the public, the commission should have the right to release the report. The Commission further recommends that any individual or organization with a genuine interest in any matter relating to the subject matter of an inquiry should be entitled to make submissions.

The report consists of six chapters. In chapter 1 the Commission traces the development of the public inquiry as an important instrument of government in Canada and examines the policy role of public inquiries in comparison to alternative institutions.

In chapter 2 the Commission examines the present law of public inquiries in Ontario, including the statutory criteria for the appointment of inquiries, the drafting of an inquiry's terms of reference, the selection of commissioners, the independence of inquiries to conduct their own proceedings and release their own report, the procedure and evidentiary rules governing the conduct of inquiries (including the publicity and openness of hearings, standing, and notice), and the procedures for judicial review.

Chapter 3 deals with public inquiries and the Constitution. The first part of this chapter deals with the limits of Ontario's jurisdiction under the division of powers to appoint and conduct public inquiries. The second part of the chapter examines the effect of the legal rights in sections 7 and 13 of the Charter on the conduct of inquiries. Particular attention is paid to their effect on the powers in the *Public Inquiries Act* to summon and compel testimony from individuals and the production of documents and other evidence.

In chapter 4 the case for reform is set out. This chapter includes a discussion of the criticisms that have been made of public inquiries. It also includes a discussion of the classification schemes that have been advanced, particularly the suggested distinction between advisory and investigative inquiries, as well as the various critiques that have been made of this distinction.

In chapter 5 certain law reform proposals and legislation of a number of other jurisdictions are surveyed.

Finally, in chapter 6, the major options for reform are outlined, as are the general principles that should guide reform.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The conduct of public inquiries should be guided by the following principles:

   (a) The independence of public inquiries from the executive and the Legislature should be recognized and protected;

   (b) The prejudice suffered by individuals affected by public inquiries should be minimized;

   (c) Public inquiries should facilitate public involvement; and

   (d) Efforts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence, and participation.

2. All inquiries should have the same range of powers available, but an inquiry need not use all the powers available if it considers any of them to be inappropriate to the nature of the inquiry.

3. Sworn testimony given by a witness at an inquiry should not be admissible for any purpose in subsequent proceedings governed by Ontario law.

4. No person should be summoned by an inquiry to testify or produce evidence about any subject matter in relation to which an information has been laid against that person and has not been finally disposed of.

5. (1) Everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her.

   (2) The right to refuse to testify in paragraph (1) should not be available to anyone being asked to testify about the execution of official governmental duties or to any person who has received from the proper prosecutorial authorities a grant of immunity from prosecution about the subject matter of the testimony.

6. A lawful excuse for a refusal to produce any document or thing in a person's power or control should include circumstances in which the person's right of privacy outweighs the commission's interest in their production.

7. The power contained in section 16 of the *Public Inquiries Act* to apprehend and detain a person who has failed to attend at a public inquiry in accordance with the requirements of a summons should be abolished.

8. Upon the application of an inquiry, a judge of the Ontario Court (General Division) should be permitted to issue a warrant authorizing a search for any documents or things only upon showing that

   (a) the documents and things are material to the subject matter of the inquiry;

   (b) the public interest in obtaining access to such documents and things clearly outweighs the privacy interests of the individual; and

   (c) there are reasonable grounds to believe that such documents or things will not be produced before the commission in a full and accurate condition through reliance on the commission's power to summon the production of such evidence.

9. (1) Where a commission believes that a person will be subject to serious allegations of misconduct in public proceedings of the inquiry, the commission should give the person notice of such allegations.

   (2) Notice of an allegation of misconduct should include the substance of the allegation and, where appropriate, any relevant evidence.

   (3) Notice of an allegation of misconduct should be given at the commission's earliest convenience.

   (4) A person receiving notice of an allegation of misconduct should have a right to respond and, in the commission's discretion, personally or by counsel, to cross-examine witnesses and call witnesses on matters relevant to the allegations of misconduct.

10. (1) A commission should not make a finding of misconduct against a person without giving the person prior notice of the misconduct, unless the person has already received notice of an allegation of such misconduct in accordance with recommendation 9.

(2) Notice of misconduct should include the substance of the misconduct and a summary of the evidence relied upon by the commission.

(3) A person receiving notice of misconduct should have a right to respond.

11. For the purposes of recommendations 9 and 10, "misconduct" should be defined as any finding or conclusion that could reasonably be construed as bringing discredit on an individual.

12. A commission should not be permitted to express any conclusion of law regarding the civil or criminal responsibility of any individual or organization.

13. (1) A commission should not be bound by the rules of evidence, including the rules concerning hearsay and opinion evidence.

(2) A commission should have the discretion to disallow the introduction of evidence or cross-examination if it determines that the relevance of the evidence or cross-examination would be outweighed by its prejudicial impact.

14. If within thirty days of its delivery to the Lieutenant Governor in Council, a commission's report has not been tabled in the Legislature or released to the public, the commission should have the right to release the report.

15. A commission should have a statutory power to retain offices and appoint staff, counsel, investigators and other personnel at rates of remuneration set by the Lieutenant Governor in Council.

16. Commissioners should have the same immunity as judges of the Ontario Court (General Division).

17. (1) Every commission should have the discretion to hold hearings, meetings, or any part of them, *in camera*, or to prohibit the publication of specified matters.

(2) In determining whether hearings, meetings, or any part of them, should not be open to the public, commissions should consider the effect of the publicity on the following:

(a) the ability of an individual to be treated fairly in the inquiry's proceedings or subsequent proceedings;

(b) public security; and

(c) an individual's privacy.

18. (1) Any individual or organization with a genuine interest in any matter relating to the subject matter of an inquiry should be entitled to make submissions.

(2) The form and extent of these submissions should be in the Commission's discretion.

19. A commission should have the discretion, in appropriate cases, to recommend that the government pay any of the costs incurred by a person or organization for the purpose of representation before the commission.

20. A reporting date should be imposed on a public inquiry in the order in council establishing its terms of reference.

21. Reports of public inquiries should be tabled in the Legislature or before a relevant legislative committee.

22. The conduct of an inquiry should be under the control and discretion of the commission conducting the inquiry.

RAPPORT
SUR
LES ENQUÊTES PUBLIQUES

COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO

SOMMAIRE

1992

La Commission de réforme du droit de l'Ontario a été établie en 1964 par le gouvernement de l'Ontario en tant qu'institut indépendant de recherche juridique, la première commission du genre au sein du Commonwealth. Elle fait des recommandations sur la réforme du droit dans les domaines suivants: droit statutaire, common law, jurisprudence, procédures judiciaires et quasi-judiciaires et autres matières touchant l'administration de la justice en Ontario.

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SOMMAIRE

Dans son *Report on Public Inquiries* (**Rapport sur les enquêtes publiques**) la Commission de réforme du droit de l'Ontario conclut que s'il convient de maintenir la pratique des enquêtes publiques, il faudrait toutefois réformer la loi qui les régit afin de protéger l'individu. Les enquêtes publiques ont joué un rôle important dans l'évolution de la province et du pays dans son ensemble. Bien que leur impact soit difficile à mesurer, elles ont souvent reflété les débats et les préoccupations du moment, de même que les thèmes de la réflexion politique à long terme. Les enquêtes publiques sont devenues partie intégrante du processus gouvernemental en tant qu'institution distincte de la législature, de l'exécutif et du judiciaire. Récemment toutefois deux enquêtes publiques tenues en Ontario ont été profondément affectées suite à des procédures judiciaires qui ont remis en question l'utilité des enquêtes publiques et leur justice. Une de ces enquêtes dut même mettre fin à ses activités.

La Commission distingue deux types d'enquêtes publiques; celles qui visent surtout l'élaboration des politiques, et celles qui font enquête sur des cas de conduite illégitime. Ce sont les enquêtes de ce type-ci qui risquent d'avoir le plus d'impact sur les droits de l'individu, et qui sont principalement touchées par les propositions de réforme de la Commission.

En réponse aux critiques à l'endroit des enquêtes publiques, la Commission fait certaines recommandations. Elle cherche ainsi à réduire au minimum le préjudice et les injustices que peuvent causer les enquêtes publiques, sans toutefois nuire à l'exécution de leur mandat. Par exemple, la Commission recommande que sauf certaines exceptions, toute personne assignée à témoigner devant une commission d'enquête publique puisse exercer son droit légal de refuser de témoigner parce que son témoignage risquerait de l'incriminer. La Commission recommande également que si les commissaires ont raison de croire que de graves accusations de conduite illégitime seront portées contre une personne lors d'assises publiques, ils devraient lui donner avis de ces allégations, et une personne ayant ainsi reçu avis devrait avoir le droit de répondre.

La Commission fait aussi des recommandations dans le but de reconnaître l'indépendance des enquêtes publiques par rapport à l'exécutif et à la législature, de protéger cette indépendance, de faciliter la participation du public, et d'améliorer l'efficacité et le rendement des

enquêtes publiques, tout en tenant compte des exigences de justice, d'indépendance et de participation. À cet effet, la Commission recommande que si dans les trente jours de la remise du rapport d'une commission au lieutenant-gouverneur en conseil, ce rapport n'a pas encore été déposé devant la législature ni rendu public, la commission devrait avoir le droit de rendre elle-même son rapport public. La Commission recommande de plus que toute personne ou tout organisme véritablement intéressé à une matière liée à l'enquête soit admis à présenter des observations.

Le rapport comprend six chapitres. Au chapitre 1, la Commission fait l'historique de l'enquête publique en tant qu'instrument substantiel du gouvernement au Canada. Elle étudie aussi le rôle traditionnel des enquêtes publiques dans l'élaboration des politiques, en comparaison avec les autres institutions qui existent à cette fin.

Au chapitre 2, la Commission analyse la loi actuelle sur les enquêtes publiques en Ontario, notamment les dispositions statutaires sur: l'établissement des enquêtes, la formulation du mandat, le choix des commissaires, le contrôle autonome de la commission d'enquête publique sur ses procédures internes et sur la publication de son rapport, les règles de procédure et les règles sur la preuve applicables aux enquêtes publiques (en particulier, le caractère public et ouvert des séances, la qualité pour agir et les avis), et les procédures de révision judiciaire.

Le chapitre 3 traite des enquêtes publiques du point de vue constitutionnel. La première partie du chapitre examine l'étendue des compétences de l'Ontario sur l'établissement et la conduite des enquêtes publiques, dans l'optique de la division des pouvoirs. La deuxième partie du chapitre étudie comment les articles 7 et 13 de la Charte affectent les enquêtes publiques. La Commission analyse avec une attention particulière comment ces articles affectent les pouvoirs des commissions d'enquête d'assigner toute personne à comparaître et à témoigner, et de sommer tout témoin de produire des documents ou toute autre preuve, en vertu de la *Loi sur les enquêtes publiques*.

Au chapitre 4, la Commission soutient qu'une réforme s'impose et présente des arguments en ce sens. Elle répond aux critiques à l'endroit des enquêtes publiques. Elle revoit les propositions de formules de classement fondées sur la distinction entre les enquêtes consultatives et les enquêtes en cas de conduite illégitime. Elle étudie également les diverses objections contre cette distinction.

Le chapitre 5 fait le survol de propositions de réforme du droit et de textes législatifs en vigueur dans d'autres jurisdictions.

Enfin, le chapitre 6 présente les principales options de réforme, et les principes généraux sur lesquels fonder cette réforme.

SOMMAIRE DES RECOMMANDATIONS

La Commission fait les recommandations suivantes:

1. Les enquêtes publiques devraient se fonder sur les principes suivants:

   (a) L'indépendance des enquêtes publiques par rapport à l'exécutif et à la législature devrait être reconnue et protégée;

   (b) On devrait autant que possible minimiser le préjudice causé à des individus lors d'enquêtes publiques;

   (c) Les enquêtes publiques devraient faciliter la participation du public; et

   (d) Il conviendrait d'améliorer l'efficacité et le rendement des enquêtes publiques, tout en tenant compte des exigences de la justice, de l'indépendance et de la participation.

2. Toutes commissions d'enquête publique devraient pouvoir jouir du même éventail de pouvoirs, ce qui ne signifie pas qu'une commission doive exercer tous ces pouvoirs si, compte tenu de la nature d'une enquête, l'exercice d'un de ces pouvoirs semble inopportune à une commission.

3. Le témoignage donné sous serment par un témoin lors d'une enquête ne devrait être admis en aucun cas lors de poursuites ultérieures selon des lois de l'Ontario.

4. Lors d'une enquête publique, nul ne devrait être assigné à témoigner ou sommé de présenter une preuve en rapport avec une information incriminante sur la foi de laquelle des dispositions n'ont pas encore été prises de façon concluante.

5. (1) Toute personne assignée à témoigner lors d'une enquête publique devrait pouvoir exercer son droit légal de refuser de témoigner parce que son témoignage risquerait de l'incriminer.

   (2) Les personnes suivantes ne devraient pas pouvoir se prémunir du droit de refuser de témoigner dont il est question au paragraphe (1): les personnes assignées à témoigner à propos de l'exercice de fonctions gouvernementales officielles et les personnes ayant

obtenu des procureurs de la poursuite compétents en la matière, une promesse d'immunité contre toute poursuite en rapport avec l'objet de son témoignage.

6. Une dispense légale en cas de refus de produire un document ou un effet en possession ou sous le contrôle d'une personne devrait comprendre les circonstances dans lesquelles le droit d'une personne à la protection de sa vie privée l'emporte sur l'intérêt de la commission à ce que ce document ou cet effet soit produit.

7. L'article 16 de la Loi sur les enquêtes publiques, prévoyant le droit d'appréhender et de détenir toute personne ayant fait défaut de comparaître à une enquête publique conformément à une assignation, devrait être aboli.

8. Sur requête de la commission, un juge de la Cour de l'Ontario (Division générale) devrait avoir l'autorité d'émettre un mandat de perquisition en rapport avec un document ou un effet seulement lorsqu'il est démontré que:

   (a) les documents ou les effets sont pertinents à l'enquête;

   (b) l'intérêt du public à l'accès à ces documents et à ces effets l'emporte nettement sur l'intérêt de l'individu au respect de sa vie privée; et

   (c) des motifs raisonnables portent à croire que ces documents ou ces effets ne seront pas produits devant la commission intégralement ou en bon état, par le seul recours au pouvoir de la commission d'assigner à produire cette preuve.

9. (1) Lorsqu'une commission prévoit qu'une personne sera l'objet de graves allégations de conduite illégitime lors de procédures publiques au cours d'une enquête, la commission devrait donner à cette personne avis de telles allégations.

   (2) Tout avis d'allégations de conduite illégitime devrait décrire la subtance des allégations et, le cas échéant, toute preuve pertinente.

   (3) La commission devrait donner avis d'allégations de conduite illégitime le plus tôt possible.

(4) Toute personne qui reçoit un avis d'allégation de conduite illégitime devrait avoir droit de répondre et, à la discrétion de la commission, en personne ou par l'intermédiaire de son avocat, de contre-interroger les témoins et d'appeler les témoins à la barre quant à des questions pertinentes à de telles allégations.

10. (1) Une commission ne devrait pouvoir émettre de déclaration de conduite illégitime contre une personne sans avoir antérieurement donné à cette personne un avis de la conduite illégitime, à moins que cette personne ait déjà reçu un avis d'allégations conformément à la recommandation 9.

(2) L'avis de conduite illégitime devrait décrire en substance en quoi consiste cette conduite illégitime et donner un sommaire de la preuve sur laquelle s'appuie la commission.

(3) Toute personne ayant reçu un avis de conduite illégitime devrait avoir le droit de répondre.

11. Aux fins des recommandations 9 et 10, "conduite illégitime" devrait se définir comme toute déclaration ou conclusion qui pourrait être interprétée normalement comme préjudiciable à la réputation d'un individu.

12. Une commission ne devrait pas avoir le droit de formuler des conclusions de droit sur la responsabilité civile ou criminelle d'un individu ou d'un organisme.

13. (1) Une commission ne devrait pas être liée par les règles de la preuve, ni les règles du ouï-dire et ni celles du témoignage d'opinion.

(2) Une commission devrait, à sa discrétion, avoir le droit de refuser la production d'une preuve ou la tenue d'un contre-interrogatoire si elle décide que la pertinence de cette preuve ou de ce contre-interrogatoire ne l'emporte pas sur le préjudice qu'ils peuvent causer.

14. Si dans trente jours de sa remise au lieutenant-gouverneur en conseil, le rapport d'une commission n'a pas encore été déposé devant la législature ni rendu public, la commission devrait avoir le droit de procéder elle-même à sa publication.

15. Une commission devrait avoir le pouvoir légal de louer des locaux et de retenir les services d'employés, d'avocats, d'enquêteurs et d'autres

membres de son personnel au traitement fixé par le lieutenant-gouverneur en conseil.

16. Les commissaires devraient jouir de la même immunité que les juges de la Cour de l'Ontario (Division générale).

17. (1) Chaque commission devrait pouvoir, à sa discrétion, tenir ses séances, ses assemblées, en tout ou en partie, in camera, ou interdire toute publication à propos de certains sujets spécifiques.

(2) Avant de décider si des séances ou des assemblées, en tout ou en partie, devraient se tenir à huis clos, les commissions devraient juger des conséquences de la publicité sur:

(a) l'aptitude d'un individu à être traité de manière impartiale lors des séances de la commission ou lors de procédures ultérieures;

(b) la sécurité du public; et

(c) le droit de l'individu à la protection de sa vie privée.

18. (1) Tout individu ou tout organisme ayant un intérêt véritable quant à une matière en rapport avec l'objet d'une enquête devrait avoir le droit de présenter des observations.

(2) La commission devrait décider à sa discrétion de la forme et des limites à respecter lors de la présentation de ces observations.

19. Une commission devrait pouvoir, à sa discrétion, et dans les cas opportuns, recommander que le gouvernement défraie les coûts engagés par des personnes ou des organisme aux fins de leur représentation devant la commission.

20. Les décrets formulant le mandat des enquêtes publiques devraient imposer une date de remise du rapport.

21. Les rapports des commissions d'enquête publique devraient être déposés devant la législature ou devant le comité législatif pertinent.

22. La conduite d'une enquête devrait être placée sous le contrôle de la commission qui en est responsable, et être laissée à sa discrétion.

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Ontario
Law Reform
Commission

To The Honourable Howard Hampton
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on Public Inquiries.*

Rosalie S. Abella
Chair

Richard E.B. Simeon
Vice Chair

Earl A. Cherniak
Commissioner

John D. McCamus
Commissioner

Margaret A. Ross
Commissioner

March 30, 1992

TABLE OF CONTENTS

Page

Preface xi

Introduction 1

Chapter 1 THE HISTORY AND POLICY ROLE OF PUBLIC INQUIRIES 5

1. Introduction 5
2. History and Origin of Public Inquiries 5
3. The Functions of Public Inquiries 9
4. Distinctive Features of Public Inquiries 11
5. Alternatives to Public Inquiries 13
6. The Challenge of Evaluation and Assessment 19

Chapter 2 THE PRESENT LAW OF PUBLIC INQUIRIES 25

1. Introduction 25
2. Appointment of a Public Inquiry 27
3. Procedural Rights 36
   (a) Evolution of Procedural Rights 36
   (b) Standing 39
   (c) Notice 43
   (d) Fairness 45
4. Compelling Testimony and the Production of Evidence 48
5. Evidentiary Rules and Privileges 51

6. Publicity and *In Camera* Hearings 53

7. Powers Under Part III of the *Public Inquiries Act*: Apprehension and Detention of Witnesses, and Search and Seizure of Documents and Other Evidence 57

8. Judicial Review 60

9. Miscellaneous 62

Chapter 3 PUBLIC INQUIRIES AND THE CONSTITUTION 64

1. The Division of Powers 64

(a) Introduction 64

(b) Provincial Jurisdiction to Establish Public Inquiries 65

(i) Coercive Inquiries and the Division of Powers 65

(ii) Classifying the Law as Provincial or Federal 66

(iii) The Aspect Doctrine 67

(c) Federal Limits on Provincial Jurisdiction to Establish Public Inquiries 68

(i) Federal Jurisdiction over Criminal Law and Procedure 68

a. Introduction 68

b. The Development of the Case Law 69

(1) The Early Cases: A Liberal Approach to Provincial Jurisdiction 69

(2) The Validity of and Limits on Coroners Inquests 70

(3) The Administration of Justice: Provincial Inquiries into Organized Crime and Police Misconduct 74

(4) The Administration of Justice, Prosecutorial Authority, and Limits on Provincial Inquiries 82

(5) Avoiding Legal Conclusions: A New Emphasis in *Re Nelles and Grange* 84

(6) Police Misconduct Revisited 85

(7) *Starr v. Houlden*: An Invasion of Federal Jurisdiction 90

(8) Post *Starr v. Houlden* 97

c. Conclusion: The Impact of the Federal Criminal Law Power on Provincial Jurisdiction to Establish Inquiries 101

(ii) The Operation of Federal Institutions 103

(iii) The Federal Power to Appoint Superior Court Judges 105

(d) Witnesses and Evidence Non-Compellable on Constitutional Grounds 107

(i) Suspects and Accused 107

(ii) Federal Ministers 108

(iii) Privileged Communications as a Matter of Federal Law 109

(e) Provincial Jurisdiction to Protect Inquiry Witnesses Against the Use of Their Testimony in Other Proceedings 110

2. The *Canadian Charter of Rights and Freedoms* 112

(a) Powers to Compel Testimony and the Production of Evidence 112

(b) Documents and Other Evidence 115

(c) Protection of Section 13 of the Charter 117

(d) Protection of Section 7 of the Charter With Respect to Compelled Testimony 118

(e) Protection of Sections 7 and 8 of the Charter With Respect to Compelled Production of Evidence 127

(f) The Charter and Powers Under Part III of the *Public Inquiries Act* 131

Chapter 4 THE CASE FOR REFORM 134

1. History of Criticisms 134

2. The Classification of Public Inquiries 140

(a) Subject Matter 142

(b) Classification by Origin and Composition 144

(c) Functional Classifications 146

3. Critiques of the Advisory/Investigatory Distinction 148

Chapter 5 THE LAW IN OTHER JURISDICTIONS AND REFORM PROPOSALS 151

1. The American Approach 151

2. The British Approach 156

3. The Australian Approach 162

4. The New Zealand Approach 168

5. Other Provinces in Canada 170

6. The Federal Approach in Canada 178

7. The Approach of the Law Reform Commission of Canada 180

Chapter 6 PROPOSALS FOR REFORM 184

1. Retention of Public Inquiries 184

2. The Classification of Public Inquiries: "Advisory" and "Investigatory" Inquiries 189

3. Fairness and Public Inquiries 191

(a) Self-Incrimination 191

(b) Powers Under Part III of the *Public Inquiries Act*: Apprehension and Detention of Witnesses, and Search and Seizure of Documents and Other Evidence 200

(c) Notice Rights 201

(d) Admissibility of Evidence 205

4. The Independence of Public Inquiries 205

5. Public Participation in Public Inquiries 207

6. Efficacy and Efficiency 210

7. Conclusion 213

SUMMARY OF RECOMMENDATIONS 214

PREFACE

The Commission's *Report on Public Inquiries* was initiated in May, 1990. Professor Kent Roach, of the Faculty of Law, University of Toronto, was appointed as Project Director. Professor Roach was assisted by a Research Team, which prepared a number of working papers for the project.[1] In addition to the Project Director, the members of the Research Team included Professor Jamie Benidickson, Faculty of Law, Common Law Section, University of Ottawa; Professor Alan Mewett, Faculty of Law, University of Toronto; Professor Marilyn Pilkington, Osgoode Hall Law School, York University; and Professor Alan Young, Osgoode Hall Law School, York University. The Commission wishes to express its appreciation to the Project Director and the other members of the Research Team for their valuable contributions to this report.

In addition to the Research Team, the Commission established an Advisory Committee, comprising members drawn from the bench, the bar, and the universities. The members of the Advisory Committee were: The Honourable Mr. Justice Horace Krever, Ontario Court of Appeal; Professor Stefan Dupré, Department of Political Science, University of Toronto; Professor Allan Manson, Faculty of Law, Queen's University; Professor Liora Salter, Osgoode Hall Law School, York University; Robert P. Armstrong, Q.C., Barrister & Solicitor, Toronto; John I. Laskin, Barrister & Solicitor, Toronto; and Stephen T. Gouge, Q.C., Barrister & Solicitor, Toronto. The Commission wishes to acknowledge, with appreciation, the contribution of the Advisory Committee to this report. The Commission also wishes to express its appreciation to J.J. Morrison, Commission Counsel, who was responsible for completing the Commission's report.

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1 The following working papers were prepared for the Commission: Benidickson, "The Policy Function of Public Inquiries"; Mewett, "Public Inquiries and Self-Incrimination"; Pilkington, "The Division of Powers and Public Inquiries"; and Young, "The Constitutionality of the Investigatory Powers of a Public Inquiry".

INTRODUCTION

Public inquiries have played an important role in the history of both the province and the country as a whole. Although the impact of such inquiries is difficult to judge, they have often dealt with the pressing concerns and controversies of the day, as well as many aspects of the longer term policy agenda. The governments that have appointed public inquiries have responded to diverse pressures, including the need for independent scrutiny of controversies, in-depth research into increasingly complex matters of governance, and public and flexible vehicles for consultation with affected interests. Public inquiries have become an important part of government, distinct from the Legislature, the executive, and the judiciary.

Despite their importance and their unique place in our system of government, scepticism, even cynicism, about the utility of public inquiries has always been present. In recent years the concern about whether the benefits of public inquiries outweigh their costs has increased. The utility of the public inquiry as a policy option should be viewed in relation to its alternatives. These vary with the diverse policy objectives of inquiries, from police investigations and prosecutions, at one end of the spectrum, to legislative committees, task forces, and a wide variety of agencies and advisory bodies, at the other.

If public inquiries are to continue to be an important policy instrument, it is clear that they will have to continue to evolve. As in other aspects of government, public inquiries must adjust to demands from the public for an increased voice in their deliberations, and for public inquiries to represent affected interests more effectively. Similarly, as with other aspects of government, the courts are playing an increasing role in supervising the conduct of public inquiries. The procedures adopted by public inquiries, especially those with a mandate to investigate suspected wrongdoing, have become increasingly judicialized, thereby raising concerns about the time, expense and, most importantly, the fairness, of such inquiries. On the other hand, there are public inquiries in which no issue of wrongdoing arises at all, and for these policy-making inquiries a totally different perspective may be appropriate.

For a variety of reasons, judicial review is likely to play a more important role in the future of public inquiries. The diminished distinction, for the purposes of judicial review, between administrative and quasi-judicial functions,[1]

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[1] *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, and *Re Ombudsman of Ontario and Ontario Labour Relations Board* (1986), 58 O.R. (2d) 225, 18 O.A.C. 215 (C.A.).

and the introduction of the *Canadian Charter of Rights and Freedoms*[2] have expanded the obligation on the courts to ensure that inquiries operate fairly. Moreover, the activities that may be undertaken by provincially appointed public inquiries are limited by the division of powers set out in the *Constitution Act, 1867*.[3]

The activities of two recent Ontario public inquiries have been shaped, and in one case terminated, by judicial proceedings raising questions about the utility and fairness of public inquiries. Concerns about the fairness of public inquiries animated the 1984 decision of the Ontario Court of Appeal to the effect that an inquiry into the deaths of infants at the Hospital for Sick Children should not "name names" or express conclusions of law regarding civil or criminal responsibility.[4] More recently, concerns about the fairness of public inquiries arose in the Supreme Court of Canada's decision in *Starr v. Houlden*,[5] which held that an inquiry appointed under Ontario's *Public Inquiries Act*[6] was beyond provincial competence because it amounted to a substitute for criminal proceedings. The powers granted to public inquiries to compel any person to testify, and to produce documents, are indeed exceptional, and will likely come under further scrutiny under the Charter. While the wide publicity given to many public inquiries might make them an effective policy instrument, in some cases it might threaten an individual's right to receive a fair trial.

Although recent cases manifest concern about the fairness of public inquiries, both in relation to their publicized and coercive processes and their possible effects on subsequent criminal, administrative, or civil proceedings, the legitimate limits of the inquiry process are not clear. In *Starr v. Houlden*[7] the majority of the Supreme Court of Canada did not find it necessary to decide whether the inquiry violated the Charter rights of any person subject to its process. One judge, in dissent, agreed with the Ontario Court of Appeal that, because inquiries are bodies that only recommend, as opposed to adjudicate, they do not threaten to deprive individuals of the right to life, liberty, and security of the person, as protected by section 7 of the Charter. In her opinion, provisions ensuring that testimony compelled at public proceedings will not be used in subsequent proceedings satisfied constitutional standards against self-

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2 Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "Charter").

3 30-31 Vict., c. 3 (U.K.).

4 *Re Nelles and Grange* (1984), 46 O.R. (2d) 210, 9 D.L.R.(4th) 79 (C.A.).

5 [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641 (subsequent references are to [1990] 1 S.C.R.).

6 R.S.O. 1990, c. P.41.

7 *Supra*, note 5.

incrimination.[8] On the other hand, another member of the court who had joined in the majority of that decision made extra-judicial statements shortly after the release of *Starr v. Houlden* to the effect that inquiries "which aim directly at the alleged wrong doing of the specific individuals", but operate without the safeguards of the criminal process, are unfair and invalid.[9] There is understandable confusion about the fairness and future of public inquiries.

This report consists of six chapters. The first chapter traces the development of the public inquiry as an important instrument of government in Canada and examines the policy role of public inquiries in comparison to alternative institutions. Before reform or abolition of public inquiries can be considered intelligently, it is crucial to understand the role played by public inquiries, and to appreciate the unique attributes possessed by such inquiries that might justify their costs to both governments and affected individuals.

In chapter 2 we examine the present law of public inquiries in Ontario. This encompasses a far-ranging examination of a variety of topics, including the statutory criteria for the appointment of inquiries, the drafting of an inquiry's terms of reference, the selection of commissioners, the independence of inquiries to conduct their own proceedings and release their own report, the procedure and evidentiary rules governing the conduct of inquiries (including the publicity and openness of hearings, standing, and notice), and the procedures for judicial review. The functioning of public inquiries challenges even the most developed of legal systems and, in their own way, public inquiries represent a microcosm of all the elements of the legal process.

Chapter 3 deals with public inquiries and the Constitution. Here, in part because of the relative novelty of Charter considerations and the nature of constitutional adjudication,[10] no firm distinction can be made between the present law and predictions about how the law may evolve in the future. The first part of this chapter deals with the limits of Ontario's jurisdiction under the division of powers to appoint and conduct public inquiries. It also contains a detailed account of the possible implications of *Starr v. Houlden*.[11] The second part of the chapter examines the effect of the legal rights in sections 7 and 13 of the Charter on the conduct of inquiries. Particular attention is paid to their effect on the powers in the *Public Inquiries Act* to summon and compel testimony from individuals and the production of documents and other evidence.[12] This

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8 *Ibid.*, at 1439-44, *per* L'Heureux-Dubé J.

9 Sopinka, *Public Inquiries*, address to the Canadian Institute for the Administration of Justice Conference, Winnipeg (August 24, 1990), at 3.

10 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

11 *Supra*, note 5.

12 *Public Inquiries Act, supra*, note 6, s. 7(1).

chapter will thus examine some of the most coercive and controversial powers of public inquiries. The focus on the Constitution provides a vehicle for the discussion of the competing interests, purposes, and principles at stake. While constitutional limits obviously define the minimum safeguards, it is not intended to suggest that they constitute the best policy, or that they should guide the recommendations of the Commission.

In chapter 4 we set out the case for reform. This chapter includes a discussion of the criticisms that have been made of public inquiries. It also includes a discussion of the classification schemes that have been advanced, particularly the suggested distinction between advisory and investigative inquiries, as well as the various critiques that have been made of this distinction.

In chapter 5 we survey certain law reform proposals and legislation of a number of other jurisdictions. Many Commonwealth jurisdictions have experience with public inquiries and have their own version of public inquiries legislation. Although the United States does not have the same experience with the appointment of *ad hoc* inquiries, its experience with Congressional investigations, particularly the protections afforded to those who are compelled by subpoena to testify or to produce documents, is well worth examining. In addition, the federal structures of both Canada and Australia present an interesting diversity in attempts to govern the appointment and conduct of public inquiries. The work of the Law Reform Commission of Canada in the late 1970s[13] remains an important contribution to the state of knowledge about public inquiries and it is given careful consideration.

Finally, in chapter 6, we outline and assess the major options for reform, formulate the general principles that should guide reform, and make a number of specific recommendations for reform of the law of public inquiries.

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13 Law Reform Commission of Canada, *Administrative Law[:] Commissions of Inquiry*, Working Paper 17 (1977), and Law Reform Commission of Canada, *Advisory and Investigatory Commissions*, Report 13 (1979).

CHAPTER 1

THE HISTORY AND POLICY ROLE OF PUBLIC INQUIRIES

1. INTRODUCTION

Public inquiries reflect a tradition in the conduct of public life in Canada that has itself become the subject of close scrutiny in recent years. Notwithstanding the formidable legacy of commissions of inquiry in contributing to the illumination and resolution of innumerable issues, from the ordinary to the obscure, critics have focused on their procedural autonomy and constitutional limitations to call for reconsideration, or even elimination, of an institution that has been described as a "part of the regular machinery of government".[1] While the advent of the *Canadian Charter of Rights and Freedoms*[2] has encouraged such criticisms, they clearly predate the Charter era.

With a view to providing the historical context and a general analytical setting for the more detailed and policy-oriented chapters that follow, the following elements of the public inquiry process are surveyed in this chapter: (1) the history and origin of public inquiries in Canada; (2) the purposes served by public inquiries; (3) the distinctive features of public inquiries; (4) the alternatives available to the formal public inquiry; and (5) the factors relevant to the assessment and evaluation of inquiries, and to the conceptual and practical difficulties in evaluating inquiries in a systematic and comprehensive manner.

2. HISTORY AND ORIGIN OF PUBLIC INQUIRIES

While the direct legislative antecedents of Canadian commissions of inquiry date from the mid-nineteenth century, analogous institutions originated much earlier. It can be argued that the Anglo-American justice system has had its

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1 *Re The Ontario Crime Commission; Ex parte Feeley*, [1962] O.R. 872, at 888, 34 D.L.R. (2d) 451, at 467 (C.A.).

2 Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "Charter").

inquisitorial elements since the 1080s—the early years of the Norman conquest—and the establishment of coroner's inquests shortly thereafter.[3]

Statutory provisions first introduced in the Canadas in 1846[4] were regularly re-enacted until Confederation, when they became a permanent feature of public life in Canada.[5] Subsequent federal legislation provided in 1880 for the creation of departmental investigations, now technically known as Part II inquiries under the federal system. In 1912, the statutory framework was expanded with the introduction of certain procedural provisions, including the safeguard contained in section 13 of the current federal *Inquiries Act*[6] that "[n]o report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel". Further legislative action in 1934 amended the *Inquiries Act* to encompass the possibility of international commissions and tribunals.

It has been observed that general statutory provisions permitting the creation of public inquiries in Canada by executive decision resulted in "a machinery of government quite unlike its British counterpart" where the royal prerogative, specific legislative authorization, or resolution of both Houses of Parliament is required for the creation of an inquiry.[7] Ease of creation might be one of the factors responsible for the frequency with which inquiries have been used in Canada, particularly in comparison with the United Kingdom.

Although attempts to inventory the use of commissions by the federal government have presented difficulties, several listings have been developed.[8] The most widely cited estimate of the number of inquiries is that formulated by the Law Reform Commission of Canada in 1977, which stated that "[a]n examination of the sources suggests that, roughly speaking, from 1867 to the

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3 Manson, "Standing in the Public Interest at Coroner's Inquests in Ontario" (1988), 20 Ottawa L.Rev. 637, at 638-44.

4 *An Act to empower Commissions for inquiring into matters connected with the public business, to take evidence on oath*, 1846, 9 Vict., c. XXXVIII (Prov. of Can.).

5 *An Act to repeal Chapter 13, of the Consolidated Statutes of Canada, so far as the same relates to Ontario;—to authorize the publication of an Ontario Gazette, and to make provision for Inquiries concerning public matters and official notices*, 1868, 31 Vict., c. VI, s. 1 (Ont.) (hereinafter referred to as "*An Act to repeal Chapter 13*").

6 R.S.C. 1985, c. I-11.

7 Henderson "Abuse of Power by Royal Commissions", in *Special Lectures of the Law Society of Upper Canada 1979[:] The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (1979) 493, at 495-96.

8 See National Archives of Canada, Government Archives Division, General Inventory Series, *Records of Federal Royal Commissions* (RG33), Introduction, at xix, n. 11, for reference sources containing lists of federal royal commissions.

present day, about 400 commissions have been appointed under Part I, and, from 1880, close to 1,500 under Part II."[9] This estimate provides no indication of the number of additional inquiries carried out by officials exercising *Inquiries Act* powers conferred by means of incorporation through other authorizing statutes.

Inquiries similar in nature to those established under the federal *Inquiries Act* have been permitted by comparable provincial legislation, and provincial inquiries have been constituted for consideration of a wide range of matters. Shortly after Confederation an Act was passed that enabled the Lieutenant-Governor in Council to establish an inquiry "concerning any matter connected with the good government of this Province, or the conduct of any part of the public business thereof, or the administration of Justice therein".[10] As is the case today, such inquiries were vested with the power to summon witnesses, require them to testify under oath, and produce documents and other things. One important exception, however, was that "no such party or witness shall be compelled to answer any question, by his answer to which he may render himself liable to a Criminal Prosecution".[11]

Ontario seems to have resorted to the public inquiry device with somewhat less frequency than the federal government. A catalogue of Ontario public inquiries from Confederation to 1984 reveals that 189 inquiries have reported in Ontario.[12] The Ontario Act, however, has never contemplated internal departmental investigations authorized by Ministers as under Part II of the federal Act. Therefore, when consideration is given only to inquiries appointed by the Cabinet, Ontario has appointed slightly fewer than half the number of inquiries than the federal government. The subjects of Ontario's inquiries have ranged from an investigation of attempts to bribe members of the Legislature[13] to inquiries on the development of Ontario's mineral resources[14] and unemployment

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9 Law Reform Commission of Canada, *Administrative Law[:] Commissions of Inquiry*, Working Paper 17 (1977), at 10.

10 *An Act to repeal Chapter 13, supra*, note 5, s. 1.

11 *Ibid.*, s. 2.

12 Ontario, Legislative Library, Research and Information Services, *Ontario Royal Commissions and Commissions of Inquiry 1867-1978: A Checklist of Reports* (1980), and Ontario, Legislative Library, Research and Information Services, *Ontario Royal Commissions and Commissions of Inquiry 1979-1984: A Checklist of Reports* (1985).

13 See Ontario, *Report of the Commissioners Appointed to Inquire into and Investigate Certain Charges of a Conspiracy to Corrupt and of Attempts to Bribe Certain Members of the Legislature with the Evidence Taken and Documents* (1885).

14 See *Report of the Royal Commission on the Mineral Resources of Ontario and Measures for Their Development* (1890).

in the province.[15] One Ontario commission was even established in 1892 to examine the dehorning of cattle.[16]

There has been a tendency to increase the use of public inquiries in Ontario in recent years, with governments appointing, on average, two inquiries a year over the last fifteen years. The subjects of these inquiries range from specific acts of wrongdoing and governmental conduct, such as the commission appointed to inquire into certain deaths of infants at the Hospital for Sick Children and the subsequent police investigation,[17] to more general policy matters, such as the inquiry into Ontario's electrical power needs.[18] Other topics have ranged from general matters such as inquiries into residential tenancies and rent review,[19] health and safety issues arising from asbestos use,[20] and the future use of Toronto's Islands and waterfront[21] to specific matters such as the granting of a tax exemption to a named company[22] and the disposal of toxic fuels at a named facility.[23] These diverse commissions share little in common, other than the general objectives of public exposure and independent analysis of matters of public concern.

In 1971, following the report and recommendations of the *Royal Commission Inquiry into Civil Rights*,[24] Ontario's inquiries legislation was amended[25] to clarify "the rights and responsibilities of persons who may be brought before public inquiry" and "the procedure to be followed by a

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15 See *Report of the Ontario Commission on Unemployment* (1916).

16 See *Report of the Ontario Commission on the Dehorning of Cattle* (1892).

17 See Ontario, *Report of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters* (1984) (hereinafter referred to as the "Grange Commission").

18 See Ontario, Royal Commission on Electric Power Planning, *Shaping the Future[:] The First Report by the Royal Commission on Electric Power Planning* (1976); *A Race Against Time[:] Interim Report on Nuclear Power in Ontario* (1978); *Report on the Need for Additional Bulk Power Facilities in Southwestern Ontario* (1979); *Report on the Need for Additional Bulk Power Facilities in Eastern Ontario* (1979); *Report of the Royal Commission on Electric Power Planning [Final Report]* (1980).

19 See Ontario, *Report of the Commission of Inquiry into Residential Tenancies* (1984).

20 See Ontario, *Report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario* (1984).

21 See Ontario, *Report of the Commission of Inquiry into the Toronto Islands[:] Pressure Island* (1981).

22 See Ontario, *Public Inquiry into Ronto Development Company* (1977).

23 See Ontario, *Report of the Royal Commission Appointed to Inquire into Waste Management Inc., et cetera* (1978).

24 Ontario, *Royal Commission Inquiry into Civil Rights* (1968) (hereinafter referred to as "McRuer Report").

25 *Public Inquiries Act, 1971*, S.O. 1971, c. 49.

commissioner in the conduct of that inquiry".[26] Some of the 1971 reforms, particularly those respecting the right to notice, were considered to be responses to situations that had arisen not long before in the Ontario courts.[27] The observation of one commentator, to the effect that inquiries were "technically free to devise their own methods of operation",[28] may also have contributed to the reform initiative. In any event, the McRuer Report reforms received favourable comment[29] and, as will be seen in the next chapter, foreshadowed some concerns that have arisen under the Charter. Notwithstanding these reforms, some aspects of the procedures used by inquiries in Ontario have continued to attract serious criticism.

3. THE FUNCTIONS OF PUBLIC INQUIRIES

The following six principal inquiry functions have attracted a fairly consistent following over the years:[30]

> (a) they enable the government to secure information as a basis for developing or implementing policy; (b) they serve to educate the public or legislative branch; (c) they provide a means to sample public opinion; (d) they can be used to investigate the judicial or administrative (police, civil service, Crown corporations) branches; (e) they permit the public voicing of grievances; (f) they enable final action to be postponed.

It has been argued that "[a]ny one or any combination of these purposes may serve a government as its reason for creating a royal commission. But ultimately the six purposes become one: to secure information as a basis for policy".[31] Similarly, it has been suggested that the public inquiry is a "multi-purpose instrument...[that] facilitates the development, the implementation and the final acceptance of particular state initiatives in those areas it has examined.

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26 Hon. A.F. Lawrence, in Ont. Leg. Deb., 4th Sess., 28th Leg. (June 24, 1971), at 3179.

27 *Re Ontario Crime Commission*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382 (C.A.); *Re The Ontario Crime Commission; Ex parte Feeley*, *supra*, note 1; and *Re Public Inquiries Act and Shulman*, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.). These cases are examined *infra*, ch. 2, sec. 3.

28 Lockwood, "A History of Royal Commissions" (1967), 5 Osgoode Hall L.J. 172, at 175.

29 Henderson, *supra*, note 7, at 522.

30 Macdonald, "The Commission of Inquiry in the Perspective of Administrative Law" (1980), 18 Alta. L. Rev. 366, at 372. See, also, Hodgetts, "Should Canada Be De-Commissioned?[:] A Commoner's View of Royal Commissions" (1964), 70 Queen's Q. 475, at 480.

31 Doern, "The Role of Royal Commissions in the General Policy Process and Federal-Provincial Relations" (1967), 10 Can. Pub. Admin. 417, at 421.

In each of the above ways, the commission also performs a variety of important functions in the realm of public administration".[32] Thus, many have taken the view that preparing "an equitable solution to the problem submitted to it" can be seen as the central or principal purpose of royal commissions.[33] The multi-purpose and indeterminate nature of the policy objectives of an inquiry makes it more difficult to assess an inquiry's effectiveness or to calculate its benefits. Nevertheless, the inquiry's policy orientation makes it likely that costs faced by individuals who are subject to its processes will be minimal.

If the above explanation were accepted as an accurate description of the function of inquiries, it would go a long way towards providing a defence for their creation and standards for monitoring their operation. Any coercion of individuals would be suspect, and could be judged to determine whether it really contributed to the development of the most effective policy.

As a practical matter, however, public inquiries are sometimes not based on detached aspirations to develop the most effective policy available. Scandals often result in demands for public inquiries. Specific incidents of wrongdoing or accidents are often linked in the public and partisan mind to structural causes. This leads to calls for an examination of both specific incidents of malfeasance as well as its structural causes. The analytic divide between retrospective considerations of fault and prospective considerations of the means to prevent wrongs or disasters in the future often become quite blurred. In part this is because of an inclination in our political culture to assign blame for things that should not happen.[34] One need only think about the recent Royal Commission on the Donald Marshall Jr. Prosecution,[35] or any inquiry into a mass disaster such as a toxic spill or the sinking of a ship, in order to understand how an inquiry could be concerned with both investigating discrete events as well as engaging in more general policy research. In order to understand the problem to be addressed and to recommend good policy for the future, it is often necessary to know in some detail what went wrong in the past. It remains difficult to calculate the effectiveness of these types of inquiries in terms of policy solutions or raising awareness of a problem, but the costs that can be suffered by individuals subject to the inquiry's processes can be greater due to the more focused nature of the proceedings.

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32 Macdonald, *supra*, note 30, at 372.

33 Walls, "Royal Commissions—Their Influence on Public Policy" (1969), 12 Can. Pub. Admin. 365.

34 Wells, "Inquests, inquiries and indictments: the official reception of death by disaster" (1991), 11 Legal Stud. 71.

35 Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioners' Report[:] Findings and Recommendations* (1989).

4. DISTINCTIVE FEATURES OF PUBLIC INQUIRIES

A convenient point of departure for the present discussion is to consider what would be lost if public inquiries were to be removed from the institutional spectrum of modes of inquiry. Perhaps the first thing to note is that the institution with the greatest degree of independence, and the potential for a very high level of openness and visibility, would disappear. Also sacrificed would be the opportunity afforded by public inquiries for the creative framing of issues.[36] Thus, the investigation and analysis of significant public questions would tend to be pursued through institutions whose focus is often restricted by a conventionally circumscribed mandate and by patterns of thought that, by focusing on the application of existing norms to past events, may preclude essential insights. Also lost would be the flexible political dynamic that can be incorporated into the work of a public inquiry through the appointment of commissioners either as representatives of affected interests, or impartial and highly respected arbiters of conflicting interests.

One of the most frequently noted limitations of existing institutions, especially the criminal or regulatory offence prosecution, is the tendency to fragment issues into a limited set of categories established by existing norms. Certain potential advantages of the inquiry are lost as a result. Thus, it has been suggested that "[i]n most of the inquiries about 'wrongdoing', the factors that encourage 'wrongdoing' are as important as the conduct of the individuals involved".[37] However, this focus on social causes and conditions is systematically ignored in prosecutions, which have limited frames of reference and constrained definitions of relevant and admissible evidence. Similarly, "[l]egal linearity" has been criticized for its assumption that "an act always has an identifiable author, rather than being primarily the product of the activity of an organization or the product of a complex process".[38] Potentially, at least, public inquiries are in a position to circumvent or overcome limitations of this nature but, as has been pointed out in a recent examination of inquiries into mass disasters, even the inquiry process can fall prey to the assignment of fault based on pre-existing standards.[39]

The symbolic value of inquiries should not be ignored. Although this observation is not readily subject to verification, the elimination of the public

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36 Macdonald, *supra*, note 30, at 388-90.

37 Salter, "The Two Contradictions in Public Inquiries", in Pross, Christie, and Yogis (eds.), *Commissions of Inquiry* (1990) 173, at 186.

38 Robardet, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?", in Pross, Christie, and Yogis, *supra*, note 37, 111, at 125.

39 Wells, *supra*, note 34.

inquiry would deprive the community of what has been described as the "social function" of inquiries:[40]

> [A] commission...has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can effect the problem are of profound importance.
>
> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction.... Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

Reasonable observers might differ on the extent to which any particular inquiry has performed its "social function" and assisted in the articulation of a new understanding of some policy field or public concern. The Mackenzie Valley Pipeline Inquiry is often mentioned in this regard, both for its process and as a result of the final report.[41] Similarly, commissions such as the Massey Commission on Culture,[42] the Royal Commission on the Status of Women[43] and the Commission on Bi-lingualism and Bi-culturalism[44] are often perceived as turning points and benchmarks in public attitudes and policy trends. Arguably, several very recent inquiries have also contributed to a dramatic transformation in popular perceptions of some previously poorly illuminated aspects of Canadian society and institutions. The inquiry into the Marshall prosecution[45] and other ongoing investigations of native justice issues, and the investigation of the physical and sexual abuse of children at the Mount Cashel orphanage in

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40 Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Ziegel (ed.), *Law and Social Change* (1973) 80, at 85.

41 Canada, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (1977).

42 Canada, Royal Commission on National Development in the Arts, Letters and Sciences 1949-1951, *Report* (1951).

43 Canada, *Report of the Royal Commission on the Status of Women in Canada* (1970).

44 Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (1967-70).

45 *Supra*, note 35.

Newfoundland,[46] all seem to be candidates for this status. Recent demands by aboriginal and women's groups for various public inquiries also stand as a testament to the importance these groups attach to the social function and status attached to public inquiries. When a government appoints an independent public inquiry with highly respected commissioners to examine a social problem, it does something qualitatively different than when it appoints a less independent task force or advisory body to examine the same problem.

5. ALTERNATIVES TO PUBLIC INQUIRIES

One recent case illustrates the degree to which the activities of public inquiries can overlap with those of other institutions, and the potential that, in some instances, a public inquiry might be an inappropriate policy instrument. In *Starr v. Houlden*,[47] several investigatory proceedings had been launched prior to the formation of the inquiry. Operating under the authority of the *Election Finances Reform Act*,[48] the Commission on Election Finances began to look into possible breaches of the statutory norms. The Conflict of Interest Commissioner assumed responsibility for inquiring into possible conflicts of interest on the part of members of the Legislature, and the Ontario Provincial Police began investigation of *Criminal Code*[49] and provincial offence violations.[50] As an element of the cumulative argument used to strike down the Houlden inquiry, Mr. Justice Lamer refers to Premier Peterson's own initial rejection of a public inquiry, on the grounds that other independent investigations were underway, to support his view that the inquiry was *ultra vires* the provincial authority.[51] "The terms of reference," Lamer J. remarked, "simply make no mention of an examination of the overall system governing how government officials deal with charities specifically, or with respect to outside interests generally." Indeed, he continued, the investigation of public officials "depends upon whether they have had dealings with the named individuals, neither of whom are public officials". He found no convincing

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46 Newfoundland, Royal Commission of Inquiry into the Response of Newfoundland's Justice System to Complaints (1991) (report not yet released).

47 [1990] 1 S.C.R. 1366, 68 D.L.R.(4th) 641 (subsequent references are to [1990] 1 S.C.R.).

48 R.S.O. 1980, c. 134.

49 R.S.C. 1985, c. C-46.

50 *Starr v. Houlden, supra*, note 47, at 1374-75. Mme. Justice L'Heureux-Dubé noted that questions were raised about the effectiveness of the Conflict of Interest Commissioner's investigation in light of limitations on the Commissioner's authority to release an opinion and recommendations without consent: *ibid.*, at 1416. See *Members' Conflict of Interest Act, 1988*, S.O.1988, c. 17, s. 14.

51 *Starr v. Houlden, supra*, note 47, at 1404.

indication in either the terms of reference themselves nor in the circumstances preceding the formation of the inquiry to suggest that it was "designed to restore confidence in the integrity and institutions of government or to review the regime governing the conduct of public officials". To the extent that such objectives could be identified, Mr. Justice Lamer felt that they were merely "incidental" to the inquiry's principal purpose, that is, "the investigation and the making of findings of fact in respect of named individuals in relation to a specific criminal offence".[52]

Of course, the story does not end with the termination of the Houlden inquiry. Patricia Starr was subsequently convicted of several offences under the *Elections Finances Act, 1986*.[53] These convictions settle the official record of what happened in certain specific events. However, because of the retrospective orientation of the criminal process, they cannot result in a full inquiry into what structural factors led to this wrongdoing or make recommendations about how similar abuses can be prevented in the future. Because, as is often the case in the criminal process, the accused pleaded guilty to several of the offences charged, it might even be argued that the prosecutions did not provide complete public exposure and examination of the incidents.

Regardless of the effectiveness of particular prosecutions, it is clear that criminal and quasi-criminal prosecutions cannot fulfil all of the functions of a public inquiry. Shortly after the appointment of the Houlden Commission, Bob Rae, then leader of the Opposition, asked the following question:[54]

> I wonder if the Premier could tell us whether he is prepared to have a royal commission which, instead of dealing simply with allegations involving Mr Ashworth and Mrs Starr and Tridel, would in fact be a royal commission that would look into the whole relationship between the development and construction industries and governments in Ontario, municipal and provincial as well as federal, so that we can have some serious recommendations on the electoral process, political contributions, land use planning, speculation and land ownership, and deal with the whole problem, not simply to solve the political problem which the Premier now has but to deal with the public problem which the whole province has.

Subsequent to the termination of the Houlden Commission, some of these more general and policy-oriented issues were given to a three-person inquiry appointed on June 6, 1991, to inquire into the land use planning and development review systems including: "determination of the appropriate roles and relationships of elected officials, administrators, the development industry,

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52 *Ibid.*, at 1404-05.

53 S.O. 1986, c. 33. See *R. v. Starr*, unreported (March 20, 1991, Ont. Ct., Prov. Div.).

54 Ont. Leg. Deb., 2nd Sess., 34 Parl. (June 28, 1989), at 1711.

interest and lobby groups...in the land use planning and development review system".[55] The termination of the Houlden Commission and the appointment of this more recent inquiry demonstrates both the limits and the durability of the policy functions of public inquiries.

The array of alternatives inventoried in *Starr v. Houlden*[56] are essentially alternatives to the public inquiry as a vehicle for examining the possibility that certain existing norms, including criminal prohibitions, had been transgressed. Mr. Justice Lamer's observations[57] leave open the possibility that a more widely formulated investigation might have survived the argument that the process was essentially adversarial and criminal in nature. The focus then would have been as much prospective as retrospective, and the commission would have been as much interested in formulating new norms as it was in applying those already embodied in various existing federal and provincial laws.

As previously indicated, public inquiries are by no means alone in the fields of advising or investigating. Numerous other bodies may be charged with relatively comparable responsibilities. The criminal process, involving a police investigation, a preliminary inquiry to assess the sufficiency of the Crown's case, and ultimately a trial, if warranted in the circumstances, is one of the fundamental models having great appeal in light of the procedural conditions that govern its operations. It should be noted, however, that the orientation of this proceeding is completely retrospective. At best there may be some consideration of the structural causes—although not the cures—if the prosecution enters the sentencing stage. Disciplinary proceedings, relating to the conduct or performance of professionals in various fields, provide opportunities for investigating complaints or alleged violations of established norms not necessarily related to the possibility of criminal wrongdoing. It is possible to include in this category aspects of the work of the Canadian Judicial Council which, to a considerable extent, has replaced *ad hoc* public inquiries as a forum for examining complaints or allegations concerning judges within the scope of its jurisdiction. Complaints commissioners and the Office of the Ombudsman are available to respond on an individualized basis to concerns raised by members of the public about the conduct of various institutions and public decision-makers.[58] These latter administrative bodies have the potential to fuse the examination of specific acts of wrongdoing with considerations of policy matters

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55 Ontario, O.C. 1355/91.

56 *Supra*, note 47.

57 See *supra*, text accompanying note 52.

58 With regard to the complaints commissioner processes, see, for example, Lewis, Linden, and Keene "Public Complaints Against Police in Metropolitan Toronto: The History and Operation of the Office of the Public Complaints Commissioner" (1986), 29 Crim. L.Q. 115.

aimed at prevention. However, this a only a potential. Often disciplinary and complaint proceedings become judicialized, with independent chairpersons or hearings officers responsible for making adjudicative decisions, but with no continuing policy role. The public inquiry remains unique in combining the elements of adjudication, investigation, and policy-making in its proceedings.

Investigative and advisory functions are performed by other statutory inquiries such as the bodies mentioned in *Starr v. Houlden*,[59] and equivalents operating in relation to other matters. Departmental and interdepartmental task forces often serve in response to specific needs for assembling information or formulating recommendations relating to an area where new initiatives are considered necessary, or where the impact and effectiveness of existing policies require evaluation. Comparable work can be carried out by permanent advisory councils, such as the Economic Council of Canada, where a research agenda can be formulated and qualified researchers can often be assembled. Regulatory agencies, in so far as they do inquiry work, should also be included here along with legislative committees. Indeed, it has been argued that "[i]nasmuch as the chief function of the select committee is investigation, it may be considered the legislature's equivalent of the executive's royal commission".[60] The power of parliamentary committees to call for "persons, papers and records" in the course of performing their work has recently been considered and affirmed by the Standing Committee on Privileges and Elections.[61] Legislative committees in Ontario have similar powers.[62]

There appear to be few systematic attempts to develop a consistent analytical framework for making choices about when to appoint an inquiry. One important exception is found in the assertion that "an understanding of the selection of the instrument of inquiry and the particular mode of inquiry must be found by analyzing the instruments' characteristics and the way in which political decision makers would view these characteristics".[63]

The analysis begins with the proposition that there exists "a spectrum of modes of inquiries" including royal commissions, task forces, parliamentary committees, investigations by advisory and regulatory agencies, and studies by departmental or interdepartmental bodies. These modes are to some degree

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59 *Supra*, note 47.

60 Schindeler, *Responsible Government in Ontario* (1969) 111.

61 Canada, H.C., *Minutes of Proceedings and Evidence of the Standing Committee on Privileges and Elections*, (No. 1), 3rd Sess., 34th Parl. (May 27, 1991).

62 See, generally, Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (1981).

63 Trebilcock, Hartle, Prichard and Dewees,*The Choice of Governing Instrument*, study prepared for the Economic Council of Canada (1982), at 38.

interchangeable, in that they have a similar ultimate result, that is, "the production after a period of time of a report or recommendation on a matter of policy".[64] It is their differences, however, or the perception of differences by political decision-makers responsible for selecting between them, that determine the circumstances in which one mode or form of inquiry will be favoured over the others. Six relevant differences are considered.[65]

First, with regard to *ministerial accountability* for the operation and results of an inquiry, the five modes differ significantly, royal commissions being most independent and departmental inquiries being most subject to control. Depending upon the circumstances, a high degree of inquiry independence may or may not be desirable from the perspective of the responsible politician: "Where he wants to retain flexibility, defer responsibility, and claim independence, he will choose a mode of inquiry that is relatively less accountable to him. Conversely, where control is of the essence, he will opt for a form of inquiry that can be held fully accountable to his executive authority."[66] From the public's perspective, independence has its own virtues and vices. Often it will be thought that a ministry or the elected government has a vested interest in covering up wrongdoing and refusing to admit structural deficiencies. In such circumstances independence is desired. On the other hand, the independence of an inquiry may create difficulties when it comes time for government to consider its recommendations. This is particularly so given the temporary nature of an inquiry's existence. There is often no institutional voice to defend the inquiry and press for the implementation of its proposals either inside or outside of government.

Second, modes of inquiry vary in terms of their *political dynamic*, that is, the diversity and influence of their participants, and their relative accessibility. While parliamentary bodies are likely to be responsive to various perspectives on the basis of the partisanship incorporated into their composition, departmental inquiries are least likely to be representative of interest groups and most subject to bureaucratic influence. "Thus, when a politician wishes to put some distance between an inquiry and his departmental staff, he will opt for an inquiry offering some degree of independence. In contrast, where he wishes to announce an inquiry but at the same time maintain the dominant position of his bureaucrats in determining the outcome, he will opt for a form of inquiry that will maximize their influence."[67] Again, on the issues that can influence elections, the public may be best served by a more politically accountable parliamentary committee. On many issues, however, the public will benefit if the members of an inquiry

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64 *Ibid.*, at 37-38.

65 *Ibid.*, at 45-49.

66 *Ibid.*, at 45.

67 *Ibid.*, at 47.

effectively represent the wide range of affected interests. In other cases, it may be best to have an impartial commission that is committed to listening to all the affected interests but without a continuing stake in any policy outcome. The public inquiry is uniquely suited, because of its *ad hoc* and temporary nature, to fulfil either of the latter two functions.

Third, modes of inquiry differ with respect to the extent and manner of *participation* they permit or encourage. Departmental inquiries and task forces are seen as less likely to facilitate the participation of affected interests, whereas the other three modes are generally considered open to public representations, even to the point of offering financial assistance under certain conditions. There is currently an increase in the demand for public participation, and this will likely affect the standard operating procedures of parliamentary committees, commissions of inquiry, and task forces alike. All of these institutions can accommodate and even promote public participation. Inquiries that take on a judicialized format may deter public participation, although even this barrier to participation can be overcome with liberal financing structures.

A fourth consideration is the *visibility* of the inquiry once it has been established. The degree of visibility may be affected by the availability of funds and by the choice of personnel, with "high profile" members contributing their own prominence to the proceedings. Royal commissions have the potential to be highly visible, while the other modes offer variable opportunities for visibility as a means of satisfying symbolic objectives through the inquiry process. Departmental inquiries, however, are least likely to provide visibility.

Timing, the fifth variable relevant to the choice of inquiry mode, presents political decision-makers with the opportunity to choose between forms of investigation that demonstrate a desire for expeditiousness on the one hand or that ensure unhurried thoroughness on the other. With the exception of existing advisory agencies and royal commissions, the timing of the various inquiries is subject to significant control by the executive. As will be examined in the next chapter, public inquiries in Ontario often have a reporting date established in the constitutive order in council. Parliamentary investigations, of course, are also subject to the general constraints of the legislative agenda and the life of Parliament itself.

Finally, the question of *costs* may be relevant to the choice of inquiry mode, although it has been suggested that the resources actually required by all forms of inquiry to perform work of similar quality are likely to be more or less the same.[68] The variations are in terms of who bears these costs and the appearances that are presented. The independence enjoyed by inquiries can easily

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[68] *Ibid.*, at 48.

promote a perception of excessive spending. On the other hand, the increased visibility of the cost of public inquires, in contrast to their less visible alternatives, may actually help control excessive expenditures. Moreover, it has been argued that:[69]

> It should be kept in mind by those who would criticize the economy of commissions of inquiry that as a general rule, they are of defined and limited duration. If the expenditures on the part of the inquiry are onerous, it is of course important that such expenditures will not continue indefinitely and may not result in the creation of a permanent bureaucracy. The potential for saving is clear.

6. THE CHALLENGE OF EVALUATION AND ASSESSMENT

The point of departure for this line of analysis is the assumption that the vast majority of the recommendations of these institutions are rarely implemented, and that the reports themselves are rarely utilized. Indeed, it has been remarked that "[p]ossibly the conviction most widely entertained is that the reports of Royal Commissions are always prematurely buried in Ottawa".[70]

Although critics have been ready to condemn the high cost of public inquiries, it bears emphasizing that the question whether such inquires are worth the cost raises considerations beyond the merely financial. Increasingly, the question also involves a balance between the benefits of a public inquiry on the one hand, and, on the other hand, the costs associated with interfering with the privacy, reputation, and legal interests of individuals.

Royal commissions have also been praised, often generously, for the significance of their contribution to public life and policy. For example, it has been suggested that royal commissions and public inquiries have "brought new ideas into the public consciousness. They have expanded the vocabulary of politics, education and social science. They have added to the furniture that we now expect to find in Canada's storefront of ideas."[71] Indeed, it has been said recently that "[s]ome nations develop a culture through centuries of accumulated custom and achievement; others forge an identity through revolution or war.

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69 Iacobucci "Commissions of Inquiry and Public Policy in Canada" in Pross, Christie, and Yogis, *supra*, note 37, 21 at 27.

70 Hodgetts, *supra*, note 30, at 4/6.

71 Berger, "The Mackenzie Valley Pipeline Inquiry" (1976), 83 Queen's Q. 1, at 2.

Canada established a royal commission. Could there be a more eloquent comment on our national character?"[72]

Given the existence of both praise and condemnation for the impact or influence of public inquiries in Canada, it is necessary to examine the performance criteria that seem to have been applied. As an introductory comment it may be worthwhile to observe that criticism of inquiries for their allegedly limited success in the realm of policy-making condemns them for failure in relation to one objective only, an objective that, in the minds of many apparently thoughtful commentators, may not be central to their role. To suggest that adoption of a commission's specific recommendations in subsequent legislation constitutes an unqualified measure of success for an inquiry is a rather one-dimensional test.

One commentator argues that "one must avoid evaluating inquiries by their success in achieving the execution of policy",[73] a task for which other institutions have been designed. Moreover, he observes that the imposition of a policy-implementing responsibility on inquiries would undermine their unique advantages, "such as their detached independence from the political arena and bureaucratic politics, their flexibility and their ability to be self-determining within the terms of their mandate".[74] If this is so, a broader range of standards for assessing inquiries is required. The key to organizing various criteria that may be relevant to the process of evaluating inquiries lies in the observation that "[t]he manner in which the policy is to be arrived at may be just as important as the outcome itself".[75]

This leads to the suggestion that it is necessary to approach the process of evaluation from the perspective of both inquiry process and inquiry outcome. Thus, the same broad divisions of intrinsic and consequential contributions that were apparent in the discussion of inquiry purposes again emerge for consideration. Below, we review some of the individual efforts made to examine and evaluate the aspects of the inquiry legacy in light of these two perspectives.

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72 Litt, "The care and feeding of Canadian culture", *The Globe and Mail*, Toronto (May 31, 1991), at A15.

73 Iacobucci, *supra*, note 69, at 28.

74 *Ibid.*

75 Trebilcock, Hartle, Prichard and Dewees, *supra*, note 63, at 45. The authors further note in explanation "[a]s a result, any definition of technical efficiency that ignores this relationship of means and ends is inadequate in terms of both predicting the choice of instruments and making normative judgments regarding instrument selection. On the other hand, any definition broad enough to capture the multiplicity of inquiry objectives would be so divorced from the accepted meaning of efficiency that it would be equally unhelpful."

A valuable general contribution to the debate about the assessment of inquiries was made in the context of the public inquiry process as a mechanism for assessing nuclear facilities.[76] Adequacy, it was argued, "cannot be assessed or tested objectively". Rather, the appropriate course is to consider the inquiry process subjectively from the perspective of a range of relevant observers and, on the basis of that consideration, derive a conclusion about adequacy. In the context of the nuclear facility issue, the following list of interested observers was identified:[77]

1. Legislators: the ultimate decision makers...

2. Experts: the scientists, the technicians, the philosophers, moralists and ethicists.

3. The non-expert: the member of a community who has an active interest in the subject matter and wishes to express his views.

4. The member of the public who exhibits either a passive or peripheral interest, or is a disinterested onlooker but whose interests are nevertheless affected.

5. The commissioners: the immediate (as opposed to the ultimate) decision makers.

6. The committed member of a public interest group: the person who has a desire to convert the public, to either side of the issue.

7. The proponent: the builder of the proposed facility.

Brief summaries of several qualitative assessments of inquiry processes and results bear out the suggestion that different observers approach the evaluation exercise with different standards and concerns.

In a more recent article,[78] the author considers the influence of public opinion, as articulated through the inquiry process, on policy formation with regard to issues of economic and cultural nationalism. She reports that since the 1960s a majority of the Canadian population has supported a nationalist position

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76 Bayda, "The Adequacy of the Public Inquiry Process for Assessing Major Nuclear Facilities" (1980), 45 Sask. L. Rev. 3.

77 *Ibid.*, at 5. Of course, while the list was developed in the context of the nuclear facility issue, it can be modified for application in other contexts.

78 Bashevkin, "Does public opinion matter? The adoption of federal royal commission and task force recommendations on the national question,1951-1987" (1988), 31 Can. Pub. Admin. 390.

favouring some measure of economic and cultural protectionism. A significant minority, however, have not considered the cultural influence of the United States to be excessive, and have favoured free trade. To a considerable extent, nationalist views are reflected in the recommendations of royal commissions and task forces working in the area and, in light of the responsiveness of federal policy to these recommendations, she is prepared to conclude that public opinion, operating through the medium of inquiries, has mattered to government policy. That federal policy has not been fully consistent with majority public opinion, she attributes to the demonstrated polarization within public opinion, a situation that has contributed to the influence of elite opinion, particularly in the economic sphere where continentalist preferences have predominated.

Another commentator suggests that critical reaction to the work of the Forget Commission,[79] and neglect by government of its recommendations, was partially attributed to shortcomings in the report itself.[80] This critique, however, underlines the intrinsic complexity of a challenging issue. The failure of the Forget reforms, like the failure of proposals formulated by its predecessors, owes much to the fact that the existing unemployment insurance system is deeply embedded in Canadian society. Effective reform will require the use of mechanisms to promote negotiations amongst affected interest groups. It might be argued, therefore, that the choice of a royal commission for such a task was misguided from the outset; for only a body like a special committee of Parliament could really accomplish such an objective.

In a 1985 article, dealing with the work of a committee appointed to advise Agriculture Canada with respect to certain chemicals proposed for use as pesticides, it was explained that the circumstances of the committee process, in which a group of individuals with diverse perspectives and areas of expertise seek to produce acceptable policy recommendations relating to controversial scientific matters, produces its own internal dynamic.[81] Participants, isolated from their conventional peer group environments, make certain adaptations to the multidisciplinary committee process; scientific and policy judgments become intermingled. Although this situation differs in several respects from the conditions surrounding public inquiries, the author's conclusions are still important.

Finally, in a review of the *Report of the Commission of Inquiry on Aviation Safety*,[82] it was emphasized that greater use might have been made by

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79 Canada, Commission of Inquiry on Unemployment Insurance, *Report* (1986).

80 Pal, "Sense and Sensibility: Comments on Forget" (1988), 14 Can. Pub. Pol'y 7.

81 Salter, "Observations on the Politics of Assessment: The Captan Case" (1985), 11 Can. Pub. Pol'y 64.

82 Canada, *Report of the Commission of Inquiry on Aviation Safety* (1982).

the commission of cost-benefit analysis.[83] Instead of an "academic" mode of inquiry, the Aviation Safety Commission adopted a "judicial" approach, in which evidence from formal hearings dominated the information-gathering process at the expense of quantitative investigation and statistical assessment. The author concluded that the contribution made by the inquiry, in drawing public attention to the issue of aviation safety and in identifying organizational or administrative obstacles to effective enforcement of existing regulations, still needed to be supplemented by specific cost-benefit work to demonstrate where expenditures could most effectively be employed to enhance safety.

An inquiry that combines both an assessment of well-publicized past events and future-oriented research may be the most effective. One example would be Ontario's Royal Commission of Inquiry into the Confidentiality of Health Information, appointed in December, 1977.[84] The commission was appointed, in part, out of a concern about publicized incidents involving a breach of privacy of certain health records. This provided the impetus for the inquiry, and accounts for much of the publicity surrounding its proceedings and its high visibility. Mr. Justice Krever expressed the view that the media attention garnered by the commission served a vital function of bringing the issues into the public's consciousness. However, if the inquiry had stopped at investigating specific incidents there is reason to believe that its impact would not have been great. The commission did considerable research on the adequacy of the existing legislative and administrative framework in order to prevent the abuses of the past and protect privacy in the future. Indeed, Mr. Justice Krever recommended "after long and difficult consideration" that no prosecution be undertaken of those whose conduct he criticized. He elaborated as follows:[85]

> Prosecutions would involve a diversion of energy from the main and important task at hand, namely that of the fostering of sensitivity in order to ensure that the infractions that were committed in the past are not repeated in the future. I am reasonably confident that the publicity surrounding our proceedings has had a demonstrable inhibiting effect on the ability of those inclined to do so to commit infractions of the kind we have seen.... To undertake prosecutions would smack of a search for scapegoats despite the fact that the climate in which the activities described in detail in these pages, and which have been carried on until recently, is something for which all of us should feel responsible.

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83 Borins, "The Value of Aviation Safety: A Review of the Dubin Commission Report" (1982), 8 Can. Pub. Pol'y 596.

84 See Ontario, *Report of the Royal Commission of Inquiry into the Confidentiality of Health Information* (1980).

85 *Ibid.*, Vol. 1, at 5.

The record on the adoption of the particular recommendations of this inquiry are mixed,[86] but, as we have stressed, the tangible legislative trial of a public inquiry is at best only one criterion that can be used to measure an inquiry's effectiveness.

The above commentaries respecting individual inquiries are typical of the inquiry assessment literature. They neither praise nor condemn absolutely, offering instead a generally favourable view combined with suggestions for improvement. Where commissions are considered unsuccessful because their recommendations were not implemented or followed closely in the immediate aftermath of the inquiry report, the explanations often lie outside the work of the inquiry itself.

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86 Recommendations 50, 51, 55, 60 and 65, for example, are found in the Hospital Management Regulations, O.Reg. 518/88, ss. 21-22, dealing with access to health records. Other recommendations, in particular those with respect to the *Private Investigators and Security Guards Act*, R.S.O. 1990, c. P.25 or the *Drugless Practitioners Act*, R.S.O. 1990, c. D.18, have not been implemented in legislative form.

CHAPTER 2

THE PRESENT LAW OF PUBLIC INQUIRIES

1. INTRODUCTION

The present law of public inquiries in Ontario is composed of the provisions of the *Public Inquiries Act*,[1] judicial decisions interpreting that Act, judicial decisions concerning the common law governing the review of agencies including public inquiries, and various constitutional provisions defining the limits of the public inquiry process. In this chapter we examine the first three sources of law and leave constitutional considerations to the next chapter.

Not only are there a variety of sources of law affecting public inquiries, but there are also several functional categories. The law of public inquiries spans topics that would generally be considered to fall within the purview of a number of areas, including the law of evidence, administrative law, criminal law, and constitutional law, all of which may also be influenced by the unique position of the *ad hoc* public inquiry in our legal machinery. Thus, the law of public inquiries constitutes a distinctive legal system governing the appointment, procedures, and review of the public inquiry process.

As mentioned briefly in the last chapter, the present *Public Inquiries Act* finds many of its origins in the 1971 legislative reform.[2] This reform was based largely on the recommendations of a Royal Commission Inquiry appointed under the *Public Inquiries Act*.[3] Among the major recommendations of the McRuer Report[4] was that the powers of investigative bodies, including public inquiries, should be stated specifically in legislation and not conferred inferentially by granting those bodies the power of a court. Prior to 1971, Ontario followed the model adopted in many jurisdictions,[5] which granted a commissioner the same power to enforce the attendance of witnesses and to compel testimony and

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1 R.S.O. 1990, c. P.41.

2 *Public Inquiries Act, 1971*, S.O. 1971, c. 49.

3 Ontario, *Royal Commission Inquiry into Civil Rights* (1968) (hereinafter referred to as "McRuer Report").

4 *Ibid.*

5 See, for example, *Inquiries Act*, R.S.C. 1985, c. I-11, s. 5.

produce documents as is possessed by the court in civil cases.[6] As a result of the McRuer Report recommendations, the *Public Inquiries Act* was amended to provide specific and limited powers to require persons by summons to testify and produce documents.[7] More extraordinary powers, including the power to apprehend those who disobey a summons and to conduct searches and seizures, were made available under Part III of the Act, but only where that Part is declared by the Lieutenant Governor in Council to extend to a particular inquiry,[8] and only after judicial authorization.[9] It would appear that this power has been granted to commissions infrequently, and has been used even less frequently. From 1975 to 1990, only eight of thirty inquiries appointed under the Act had the Part III powers declared applicable, and we are aware of no reported case dealing with their use.

Under the 1971 reforms, punishment for refusal to obey various coercive orders would no longer be administered by the inquiry itself; rather it would require a stated case to the Divisional Court.[10] This was a crucial feature of the McRuer Report recommendations, guaranteeing a hearing before a court before refusal to comply with the inquisitorial processes of an inquiry resulted in the extraordinary sanction of indeterminate detention through the exercise of the contempt power. In addition, the 1971 reforms adopted the recommendations of the McRuer Report with respect to specific safeguards, such as the preservation of the evidentiary rules of privilege,[11] provision for the return of documents[12] and rights of standing and notice of allegations of misconduct.[13] The statutory basis for much of the judicialization of the public inquiry process can be traced to the McRuer Report reforms. As will be seen in the next chapter, these reforms also anticipated many concerns about fairness that are given prominence under the *Canadian Charter of Rights and Freedoms*.[14]

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6 See *The Public Inquiries Act*, R.S.O. 1960, c. 323, s. 2.

7 *Public Inquiries Act*, *supra*, note 1, s. 7.

8 *Ibid.*, s. 15(1).

9 *Ibid.*, ss. 16 and 17.

10 *Ibid.*, s. 8.

11 *Ibid.*, s. 11.

12 *Ibid.*, s. 12.

13 *Ibid.*, s. 5.

14 Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "Charter").

2. APPOINTMENT OF A PUBLIC INQUIRY

Section 2 of the *Public Inquiries Act*,[15] which grants a discretion to the Lieutenant Governor in Council to appoint a public inquiry in the broadest of terms, provides as follows:

> 2. Whenever the Lieutenant Governor in Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern and the inquiry is not regulated by any special law, the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry.

With the exception of the broadest criterion, which authorizes a public inquiry to be made of any matter declared by the Lieutenant Governor in Council to be of public concern, the remaining criteria in section 2 would appear to fall within provincial jurisdiction by referring specifically to the good government and public business of Ontario[16] and the administration of justice in Ontario.[17] The limits of Ontario's constitutional jurisdiction to appoint a public inquiry will be examined in the next chapter.

The McRuer Report[18] expressed the general view that, in order to facilitate judicial review, conditions precedent for the exercise of statutory powers should be expressed in objective terms. Nevertheless, under section 2 of the present Act, the condition precedent for the establishment of a public inquiry remains expressed in subjective terms, that is, whenever the Lieutenant Governor in Council considers it expedient or declares a matter to be of public concern. The McRuer Report suggests that such discretionary power "would be subject only to limited [judicial] review, e.g., for bias or bad faith".[19] Section 6 of the Act, which provides for judicial review by way of a stated case, clearly contemplates review of "the authority to appoint a commission under this Act" either on the commission's own motion or that of an affected party. There has been no case reviewing the appointment of a public inquiry for failure to meet the statutory condition precedent; rather, review has been based largely on the constitutional division of powers, which is examined in the next chapter. Thus, at present and

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15 *Supra*, note 1.

16 See *Constitution Act, 1867*, 30-31 Vict., c. 3 (U.K.), s. 92(16), which assigns exclusive jurisdiction to the province to legislate in relation to matters of a merely local or private nature in the province.

17 See *ibid.*, s. 92(13), which assigns exclusive jurisdiction to the province to legislate in relation to property and civil rights in the province.

18 *Supra*, note 3.

19 *Ibid.*, Vol. 1, at 390.

with the important exception of constitutional adjudication, the appointment or refusal to appoint a public inquiry remains a matter left to the discretion and political responsibility of the Cabinet.

Once a decision has been made to appoint a public inquiry under the Act, the mandate of the inquiry is set out in an order in council. The order in council establishing the inquiry is perhaps the most important document in the life of an inquiry, yet it is nowhere mentioned in the *Public Inquiries Act*. Orders in council typically contain both objective limits on the powers of a public inquiry as well as a grant to the commissioners of some subjective discretion to extend investigation. With respect to the mandate of an inquiry it has been suggested that:[20]

> [T]here is a need for greater care in the Cabinet to define the mandate of the commission, to provide specific, narrow and clear limits of the authority of the commission. The commission should not be placed in a position where it has the ability to construe its mandate in any manner as it pleases or forced to construe it as the pressure directs it.... The failure to establish clear, specific and narrow limits of the mandate of the commission is to constitute the commission into a roving inquisitor, rather than an instrument of government.

Overbroad mandates not only threaten the fairness of inquiries but also limit their efficiency and increase the time that is required for the commission to prepare a comprehensive report.[21] On the other hand, it is often difficult at the time of the appointment of an inquiry to investigate either a policy matter or suspected wrongdoing to know precisely the direction the inquiry will follow,[22] and one of the important tasks of any commissioner is to direct the energies of the inquiry as the problem unfolds. One of the distinctive features of public inquiries is their inquisitorial nature. Accordingly, it is the commission, not the parties, that sets the agenda, and this agenda often evolves during the life of a commission.

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20 Henderson "Abuse of Power by Royal Commissions", in *Special Lectures of the Law Society of Upper Canada 1979[:] The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (1979) 493, at 502.

21 The length of an ongoing inquiry into the Niagara Regional Police Force can be related, at least in part, to the breadth of its mandate, which includes 12 enumerated matters, including: "the hiring practices and promotional processes of the Force"; "any inappropriate practices or procedures with respect to the management of the Force"; "the policies, practices and procedures of the Force...respecting public complaints against members of the Force"; and "the morale of members of the Force". See Ontario, O.C. 751/88.

22 This is so in respect of an inquiry to investigate a policy matter in part because many such policy problems are "polycentric"; they are multi-causal and involve multiple policy options, each of which impact differently on some of the sources of the problems. See, generally, Fuller, "The Forms and Limits of Adjudication" (1978), 92 Harv. L. Rev. 353.

In practice, most orders in council establishing an inquiry leave some room for the commissioners to expand the scope of their investigation. In addition, the Cabinet may consider expanding an inquiry's terms of reference in subsequent orders in council. This has happened in several instances, the most notable being the Royal Commission on Electric Power Planning, which had its original 1975 mandate expanded by three subsequent orders in council to include, among other matters, issues relating to nuclear power. A specific statutory provision stating that "[t]he Lieutenant Governor in Council may revoke, modify or enlarge the scope of any commission"[23] was repealed in the 1971 reforms,[24] but this has obviously not stopped the practice of clarifying and expanding an inquiry's terms of reference. Subsequent restrictions on a commission's mandate are much less frequent and could well be perceived as a fetter on its independence. On the other hand, there may be no other way to restrain a "runaway" commission.

Objective limits in the constitutive order in council can be enforced in courts and are subject to judicial interpretation. The order in council establishing an inquiry by Mr. Justice Grange into the deaths of infants at the Hospital for Sick Children contained wording that he was to conduct his investigation "without expressing any conclusion of law regarding civil or criminal responsibility".[25] The Ontario Court of Appeal stressed the importance of this limitation and interpreted it broadly to mean that the inquiry was "prohibited from naming the person responsible [for a deliberate or accidental administration of a lethal overdose of digoxin] for to do so would amount to stating a conclusion of civil or criminal responsibility".[26] This interpretation was no doubt made in light of concerns about the constitutional limits under the division of powers and the fairness of the inquiry process toward impugned individuals. However, it also shows how the order in council establishing a commission's terms of reference can place limits on the inquiry that the commission cannot alter. The Court of Appeal specifically denied the inquiry the discretion to alter its mandate by naming names. A discussion of the implications of this case, as it relates to constitutional limits on the inquiry process, appears in the next chapter.

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23 *The Public Inquiries Act, supra*, note 6, s. 4.

24 *Public Inquiries Act, 1971, supra*, note 2.

25 See Ontario, O.C. 1076/83.

26 *Re Nelles and Grange* (1984), 46 O.R. (2d) 210, at 221, 9 D.L.R. (4th) 79, at 90 (C.A.). This provision has been included in the orders in council establishing other public inquiries, including the inquiries into the Niagara Regional Police Force and the dealings of Patricia Starr.

While granting the commission the authority to compel testimony and the production of evidence, a recently appointed Ontario inquiry to obtain information concerning the Paypom Treaty stated in its order in council:[27]

> [T]he position of the Crown in the right of the Province of Ontario is that such evidence may not be admissible in whole or in part in subsequent legal proceedings and the use of the procedures herein provided shall be without prejudice to the right of any party to such proceedings, including the Crown in right of the Province of Ontario to contest the admissibility of such information.

Although there are important limits to Ontario's jurisdiction to govern the admissibility of evidence in subsequent proceedings, as will be discussed in the next chapter, this provision does demonstrate an innovative use of an inquiry's order in council in order to limit the prejudice suffered from the exercise of its powers.

Another innovative and important use of the order in council is to impose a reporting date on a public inquiry.[28] Such reporting dates have been imposed on five of the last ten Ontario public inquiries, although in some cases subsequent orders in council have been issued to extend the deadline. There are some advantages in terms of controlling delay and limiting costs in giving inquiries a definite reporting date. On the other hand, a reporting date could limit the thoroughness of an inquiry and perhaps compromise its independence if an extension is requested by the commission but denied by the Cabinet.

Section 2 of the present *Public Inquiries Act*[29] also requires that an inquiry appointed under the Act "not [be] regulated by any special law". The Court of Appeal has held that this provision prevents the appointment of an inquiry only where both the subject matter and the scope of an inquiry is provided for in another statute.[30] Thus, the court upheld the appointment of a public inquiry into the safe use of toxins in a wet cement kiln even though the same subject matter could be examined under the *Environmental Assessment Act, 1975*.[31] The Court of Appeal stressed differences in the scope and purposes of the two hearings:[32]

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27 Ontario, O.C. 111/84.

28 Anthony and Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (1985), at 16.

29 Reproduced *supra*, this sec.

30 *Re Canadian Environmental Law Ass'n and Pitura* (1981), 32 O.R. (2d) 65, 122 D.L.R. (3d) 492 (C.A.) (subsequent references are to 32 O.R. (2d)).

31 S.O. 1975, c. 69.

32 *Re Canadian Environmental Law Ass'n and Pitura*, *supra*, note 30, at 610.

> The present inquiry is a plain inquiry to obtain information and recommendations, and nothing more. The hearing provided for under the *Environmental Assessment Act, 1975*... is clearly part of an adjudicative process, a process leading to a decision affecting rights or interests. In our view, s. 2 of the *Public Inquiries Act, 1971* should not be interpreted as preventing the Lieutenant-Governor in Council from causing an inquiry to be made into matters of public concern where the inquiry does not duplicate, or substantially duplicate, the legal process relating to the inquiry regulated by the alleged special law so that the purpose of the special law would be frustrated. The present inquiry cannot be a substitute for the requirements of the *Environmental Assessment Act, 1975*. All it can result in is a report containing information and recommendations. Such a report would find no statutory recognition in the *Environmental Assessment Act, 1975*.

This distinction between the investigative and advisory functions of public inquiries, on the one hand, and the adjudicative functions of courts and quasi-judicial bodies, on the other, runs throughout much of the law governing judicial review of public inquiries, and will be discussed in light of recent developments in a subsequent part of this chapter. For present purposes it is important to note how this distinction allowed the Court of Appeal to reject an argument that the public inquiry should not be appointed because its report would be a basis for a ministerial decision under the *Environmental Assessment Act, 1975* not to hold full hearings but to grant a ministerial permit. The court concluded that, whatever the practical significance of the inquiry, the legal processes of the public inquiry and environmental review were distinct.

Another important step in the appointment of a public inquiry is the selection of the commissioner or commissioners. Again, the *Public Inquiries Act*[33] is silent. There has been much discussion in Canada about the advantages and disadvantages of appointing judges as commissioners of a public inquiry.[34] On the one hand, fears have been expressed about politicizing the judiciary and diverting their energies. On the other hand, it has been argued that judges have a special ability to ensure fairness in the inquiry process and that they are uniquely acceptable to the public because of their independence from the executive and the Legislature. As we have seen in the last chapter, the independence of public inquiries is one of their most distinctive and important attributes.

Similarly, there has been much debate about the appropriateness of appointing commissioners who represent the interests affected by an inquiry. Some have argued that such appointments will prevent the development of

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33 *Supra*, note 1.

34 See, for example, Courtney, "Judges as Royal Commissioners" (1964-65), 44 Dalhousie Rev. 413, and Vaughan, "Mr. Justice Emmett Hall as Royal Commissioner" (1979), 17 U.W. Ont. L. Rev. 223.

effective policy and end in a series of minority reports. Others suggest that the process risks unfairness because not all the affected interests can be determined at the start of an inquiry and some may be left unfairly represented. In contrast some have argued that representative commissioners are crucial to the legitimacy and acceptance of a commission's ultimate recommendations. It is not likely that this debate will ever be settled. It should be recognized, however, that the appointment of *ad hoc* and temporary commissioners allows the government to incorporate many different types of political dynamic into the operation of a commission of inquiry.

Attempts have been made to challenge the appointment of commissioners on the ground that there is a reasonable apprehension of bias, but these attempts have not been successful.[35] In *Copeland v. McDonald*,[36] a lawyer who claimed to be the victim of illegalities committed by members of the Royal Canadian Mounted Police (R.C.M.P.) sought a writ of prohibition prohibiting the commissioners of the Royal Commission of Inquiry into certain activities of the R.C.M.P. from exercising their duties on the grounds of bias. He alleged that all three commissioners, including Mr. Justice David McDonald, had close political allegiances to the Liberal Party of Canada and that this supported a reasonable apprehension of bias in carrying out their mandate to investigate the extent to which members of the federal government, Cabinet, and the Liberal Party, authorized or were aware of illegal activities by the R.C.M.P. It was also alleged that the commissioners had prejudged the issue before them by expressing the view that certain activities of the R.C.M.P. may have been justified as being in the interest of national security.

Cattanach J. dismissed the motion on the grounds that, since a public inquiry "is but a fact-finding, reporting and advisory body", which exercises administrative as opposed to quasi-judicial functions, common law standards of bias did not apply. He stated that "[i]n my view bias in the Commission, even if it should be found to exist and I make no such finding, is irrelevant."[37] It is unlikely that courts today would deal will allegations of bias in such a peremptory fashion. As will be discussed below,[38] the distinction between quasi-

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35 In one early case a lawyer who raised allegations of bias against a commissioner was made to pay the costs of the motions on the basis that he knew his client was making false accusations. See *Re Ontario Crime Commission*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382 (C.A.) (subsequent references are to [1963] 1 O.R.). For an unsuccessful attempt to challenge a coroner's inquest on grounds of a reasonable apprehension of bias, see *Re Ewans and Milton* (1979), 24 O.R. (2d) 181, 97 D.L.R. (3d) 687 (C.A.) (subsequent references are to 24 O.R. (2d)).

36 [1978] 2 F.C. 815, 88 D.L.R. (3d) 724 (T.D.) (subsequent references are to [1978] 2 F.C.).

37 *Ibid.*, at 825.

38 *Infra*, this ch., sec. 8.

judicial functions, which were subject to judicial review, and administrative actions, which were not subject to such review, is no longer relevant in light of judicial enforcement of a general duty of fairness.[39] However, the role that this distinction plays in the availability of the common law writs of prohibition and *certiorari* remains important because allegations of bias might not be a ground for judicial review in section 6 of the *Public Inquiries Act*.[40]

The Supreme Court of Canada has been willing to review the composition of administrative bodies and even municipal councils for allegations of bias. In *The Committee for Justice and Liberty v. The National Energy Board*,[41] the court disqualified a member of the National Energy Board from hearing an application to allow the Mackenzie Valley Pipeline to go forth on the basis of previous involvement in a consortium that was a party before the Board. More recently, the Supreme Court of Canada has applied relatively deferential tests of bias to elected municipal council members sitting on a by-law committee.[42] Even though the standards against bias for judges may not be applied to inquiries where it is clear that the government wants to represent various constituencies through its choice of commissioners, the Supreme Court of Canada will likely impose some standard against bias for all commissioners. Thus, at a minimum, a commissioner should not have a direct financial interest in the subject matter of the inquiry and should be capable of being persuaded.

It might be possible to argue that the rationale in *Copeland v. McDonald*,[43] that is, that inquiries make recommendations only and do not make actual decisions affecting the parties, still applies. However, this ignores the importance of the fact-finding function of commissions and the importance of ensuring that the reasonable person perceives them to be impartial. In *Re Evans*

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39 *Nicholson v. Haldimond-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 67. See, also, Anthony and Lucas, *supra*, note 28, c. VIII.

40 Section 6(1) of the *Public Inquiries Act*, *supra*, note 1, provides for judicial review by way of a stated case where "the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question". In *Re Ontario Crime Commission*, *supra*, note 35, the Ontario Court of Appeal held that a claim of bias, arising out of certain preliminary interviews of a witness by a commissioner, did not fall within the predecessor of s. 6, which referred to review of any "decision, order, direction or other act" of a commissioner. See *The Public Inquiries Act*, *supra*, note 6, s. 5(1). It is possible that the courts might follow this case and give a narrow construction to what is reviewable under s. 6 of the present Act.

41 [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.

42 *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425, and *Old St. Boniface Residents Ass'n Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385.

43 *Supra*, note 36.

and Milton,[44] the Ontario Court of Appeal applied the bias test enunciated in *The Committee for Justice and Liberty v. The National Energy Board*[45] to a coroner's inquest on the following basis:[46]

> Although the jury is prohibited from making any finding of legal responsibility or expressing any conclusion of law on the matters to be considered by it, the very nature of the proceedings compel it, in my opinion, to act impartially in the conduct of those proceedings.

In many cases, the public's perception of a commission as being impartial is as important as its perception that the commission operates independently from interference by the government.

If the appointment of commissioners and their subsequent conduct can be reviewed for a reasonable apprehension of bias, the question remains as to the exact nature of the test of bias that is to be applied. Inquiries into allegations of various forms of governmental misconduct would seem to require the same type of impartiality as is expected from the courts. Indeed, this is probably part of the reason why sitting judges are often appointed to conduct such inquiries. This connection between the appointment of judges and the need for commissions to operate independently was made explicitly in the ruling of Mr. Justice McDonald in refusing to follow the Solicitor General's directives as to when information should be considered *in camera*.[47] Mr. Justice McDonald noted that judges are often appointed because they have security of tenure and the traditions of judicial independence increase "the likelihood that the inquiry will not be influenced by considerations to which ordinary segments of the Executive are susceptible" and ensure "that the inquiry will be conducted at arm's length from the Executive".[48] On the other hand, inquiries into policy issues, especially those that try to attain a consensus among affected groups, might benefit from having representatives of the affected interests among their membership. A test for bias could still be applied to them but it would probably reflect the more lenient test recently developed by the Supreme Court of Canada in the context of challenges to elected municipal councillors sitting on by-law committees.[49] Thus, while commissioners would not be disqualified merely because of publicly stated policy predilections, they must have an open mind amenable to persuasion, and

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44 *Supra*, note 35.

45 *Supra*, note 41.

46 *Re Evans and Milton*, *supra*, note 35, at 221.

47 *Re Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (1978), 94 D.L.R. (3d) 365 (Can. Comm. of Inquiry).

48 *Ibid.*, at 371.

49 See *Save Richmond Farmland Society v. Richmond (Township)*, *supra*, note 42, and *Old St. Boniface Residents Ass'n Inc. v. Winnipeg (City)*, *supra*, note 42.

must not have a financial interest in the outcome of the commission's recommendations.

Once the commission's mandate has been set by the order in council and the commissioners have been selected, the next step is the appointment of the commission's staff, including the commission's counsel. Once again, the present *Public Inquiries Act*[50] makes no provision for this crucial step in an inquiry's life. In practice, this power is usually granted to the commissioner in the order in council. The standard clause used in orders in council in Ontario provides that the commissioner(s) "shall have authority to engage such counsel, expert technical advisors, investigators and other staff as he or she deems proper, at rates of remuneration to be approved by Management Board of Cabinet in order that a complete and comprehensive report may be prepared and submitted".[51] This provision combines autonomy for the commission to appoint the people it deems essential, while retaining some accountability through control of the rates of remuneration.

Several cases have held that a disciplinary tribunal's counsel should not participate in the decision-making process because "[i]t is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision".[52] It has been suggested that if commission counsel "has been regarded as an adversary or a prosecutor and plays a role in the writing of the report, justice will not be seen to be done".[53] On the other hand, it is possible that, in recognition of the distinct nature of a public inquiry, commissioners could consult with inquiry counsel and staff.[54]

No provision is made in the present Act concerning the funding of inquiries. Inquiries can be funded out of either the general revenue or a departmental budget. It has been suggested that the latter form of funding "causes numerous difficulties" as the inquiry is forced to compete for funds with other departmental allocations and that this can threaten the independence of the inquiry.[55] The proper approach, it has been argued, is as follows:[56]

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50 *Supra*, note 1.

51 See, for example, Ontario, O.C. 2654/90.

52 See, for example, *Re Sawyer and Ontario Racing Commission* (1979), 24 O.R. (2d) 673, at 676, 99 D.L.R. (3d) 561, at 564-65 (C.A.).

53 Sopinka, "The Role of Commission Counsel", in Pross, Christie, and Yogis (eds.), *Commissions of Inquiry* (1990) 75, at 85.

54 *I.W.A. v. Consolidated Bathurst Packaging*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524.

55 Anthony and Lucas, *supra*, note 28, at 41-44.

56 *Ibid.*, at 42.

> At all times the financing of the inquiry must be solely within the authority and discretion of the commissioner. The government's obligation is to appoint a trustworthy person as commissioner and, having done so, they must rely on the commissioner's good sense and judgment in determining what funds are required to carry out the inquiry's mandate. While the commissioner will agree to follow government guidelines as to audit requirements and record keeping, the decision as to whether any expense is justified or warranted, both initially and on an ongoing basis, must be left solely to the commissioner. To do otherwise would be to permit budgetary controls to fetter the inquiry's independence and affect its ability to fulfil its mandate.

3. PROCEDURAL RIGHTS

(a) EVOLUTION OF PROCEDURAL RIGHTS

The general rule set out in the *Public Inquiries Act* is that "[s]ubject to sections 4 and 5, the conduct of and the procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry".[57] Such a general rule is found in many jurisdictions, and reflects the need for inquiries to be flexible to adapt their procedures to the wide variety of subject matters and participants that they encounter. Nevertheless, the modern trend has been to circumscribe the procedural autonomy of public inquiries by granting the individuals who appear before such inquiries various statutory and common law rights. In Ontario such rights were first granted as a matter of common law. Only with the reforms following the McRuer Report[58] were some of them embodied in the Act.

In *Re Ontario Crime Commission*,[59] an allegation of bias was made against the commissioner for having conducted a preliminary interview with a witness outside the presence of other witnesses. McLennan J.A. affirmed the wide discretion that each commission has in devising its own procedure and noted that a commissioner "is not governed by any specific rules as to the manner in which the inquiry is conducted and must necessarily have the widest discretion in the way in which he conducts the inquiry."[60] Despite the accuracy of this general statement, both the courts and the Legislature have intervened to impose certain procedural obligations on the conduct of inquiries.

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57 *Supra*, note 1, s. 3.

58 *Supra*, note 3.

59 *Supra*, note 35.

60 *Ibid.*, at 398.

In *Re The Children's Aid Society of York*,[61] the Court of Appeal held that during the course of a public inquiry into alleged incompetence in the administration of a Children's Aid Society, the affected parties had the right to call witnesses, cross-examine witnesses, and have disclosure of relevant records produced before the commission. In its reasons, the court stressed that these procedural rights would contribute to the effectiveness of the inquiry in discovering the truth of the matter. For example, Middleton J.A. stated:[62]

> This is a matter in which the fullest inquiry should be permitted. All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed.
>
> This is not a matter in which any one should seek, or if seeking should be permitted, to burke the fullest investigation.

It should be noted, however, that the court's intervention in this public inquiry was different from other judicial authority, which had held that because the investigatory functions of an inquiry were not "quasi-judicial", interested parties did not have the right to cross-examine witnesses, much less call their own witnesses and receive disclosure.[63]

Despite the dominant understanding that an inquiry does not exercise quasi-judicial functions, the Ontario Court of Appeal intervened in two important cases in the 1960s to ensure that commissions of inquiry treated affected persons in a procedurally fair manner. In the first case, the Ontario Crime Commission denied two individuals who had been subject to allegations of involvement in organized crime the right to be represented at the inquiry's hearing, to examine and cross-examine witnesses, and to be provided with a transcript of the *in camera* testimony of a witness, "Mr. X". Schroeder J.A. stated for the Court of Appeal:[64]

> In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the

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61 [1934] O.W.N. 418 (C.A.).

62 *Ibid.*, at 421.

63 *St. John v. Fraser*, [1935] S.C.R. 441, [1935] 3 D.L.R. 465.

64 *Re The Ontario Crime Commission; Ex parte Feeley*, [1962] O.R. 872, at 896, 34 D.L.R. (2d) 451, at 475 (C.A.) (subsequent references are to [1962] O.R.).

> risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.

Laidlaw J.A. dissented from this holding, stressing the different purposes of an inquiry from a trial, the discretion that an inquiry enjoyed to determine its procedure, and the fact that the Act (at that time) did not prescribe any specific practice or procedure for public inquiries. He argued that the procedural rights contemplated by the majority would detract from the efficiency and effectiveness of inquiries.[65]

In *Re Public Inquiries Act and Shulman*,[66] the Ontario Court of Appeal held that a party affected by the inquiry, since he was in jeopardy of being discredited if the inquiry were to find that his allegations of governmental misconduct were unfounded, should be allowed to have his own lawyer, rather than the commission counsel, conduct the examination in chief of the witnesses who were to be questioned about such allegations. Citing the above two Ontario cases, Aylesworth J.A. noted that these procedural rights were necessary because the inquiry was concerned with allegations of misconduct "and [was] a type of inquiry, therefore, to be distinguished from an inquiry directed to the gathering of information for the purposes of reporting, for example, to a Government department as to the desirability or otherwise of enacting legislation upon a given subject, or as to other corrective measures".[67] Thus, the granting of court-like procedural rights was tied to a perception that the particular inquiry was concerned with investigating allegations of past wrongdoing as opposed to gathering information to make policy recommendations for the future.

Court-like procedural requirements were imposed on public inquiries in the above three cases through a provision then in the Act that allowed courts to review "the validity of any decision, order, direction or other act of a commissioner".[68] The procedures for judicial review are discussed below.[69] For present purposes it is important to understand how the courts enforced trial-like

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65 *Ibid.*, at 883.

66 [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.) (subsequent references are to [1967] 2 O.R.).

67 *Ibid.*, at 378.

68 *The Public Inquiries Act*, *supra*, note 6, s. 5(1), as interpreted in *Re The Ontario Crime Commission; Ex parte Feeley*, *supra*, note 64, at 895. For a discussion of this "unique" review provision, see also *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at 229-30, 41 D.L.R. (4th) 429, at 465-66 (subsequent references are to [1987] 1 S.C.R.).

69 *Infra*, this ch., sec. 8.

procedural protections relating to the right to call, examine, and cross-examine witnesses and to have relevant evidence disclosed in inquiries investigating allegations of wrongdoing.

In its discussion of these cases, the McRuer Report[70] expressed considerable scepticism about codifying rigid rules of procedure for all inquiries.[71] It also expressed some concern about the potential breadth of the decision in *Re Public Inquiries Act and Shulman*,[72] in imposing strict rules of examination and cross examination and allowing "everyone who makes charges that give rise to a public inquiry a right to be examined by his own counsel before he is examined by counsel for the Commission".[73] Ultimately, the report recommended that persons "substantially and directly interested in the subject matter of an inquiry" should have an opportunity to be heard and to call and cross-examine witnesses on relevant matters.[74] The McRuer Report also recommended that a person against whom allegations of misconduct have been made should receive notice and an opportunity to be heard before the commission makes a finding of misconduct against him.[75] As we discuss below, these recommendations, which were first enacted in 1971, are now embodied in section 5 of the *Public Inquiries Act*.

(b) STANDING

Section 5(1) of the *Public Inquiries Act*,[76] provides as follows:

> 5.—(1) A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

Section 5 contains the only provisions in the Act that address specifically the procedural rights of those affected by the inquiry process.[77]

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70 *Supra*, note 3, Vol. 1, at 448-51.

71 *Ibid.*, at 450-51.

72 *Supra*, note 66.

73 McRuer Report, *supra*, note 3, Vol. 1, at 450.

74 *Ibid.*, at 451.

75 *Ibid.*, at 464.

76 *Supra*, note 1.

77 Section 5(2), which deals with the rights of persons before a finding of misconduct can be made, is discussed *infra*, this ch., sec. 3(c).

To a large extent, both the "standing" provision contained in section 5(1) and the "notice" provision contained in section 5(2), discussed below,[78] are based on the judicial model, in which it is understood that an inquiry will examine discrete acts and incidents of wrongdoing. As Linden J. noted in interpreting section 5(1):[79]

> Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest.

The strictness of the test is augmented by the fact that, once it has been found that an individual or group has a "substantial and direct interest" in the subject matter of the inquiry, section 5(1) requires that the commission grant extensive rights to call evidence and cross-examine witnesses—rights that are the equivalent of participation as a party in a civil action. It has been suggested that a similar standing provision in the *Coroner's Act*[80] "has its origin in the private law concern with limiting participation in private disputes to those with a direct interest in the issues upon which the adjudication is sought" and that it "has no utility in a forum created to serve the public interest", especially with regard to the prevention of deaths.[81] The Act contains no intermediate form of standing provision that would grant interested parties a more limited right to participation in the inquiry.[82] Moreover, it is not clear whether an inquiry has a residual discretion to grant a form of standing to individuals and groups that do not meet the requirements of section 5(1).[83]

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78 *Ibid.*

79 *Re Royal Commission on the Northern Environment* (1983), 144 D.L.R. (3d) 416, at 419, 12 C.E.L.R. 74, at 76 (Ont. Div. Ct.) (subsequent references are to 144 D.L.R. (3d)).

80 R.S.O. 1990, c. C.37, s. 41(1).

81 Manson, "Standing in the Public Interest at Coroner's Inquests in Ontario" (1988), 20 Ottawa L. Rev. 637, at 637 and 669. Historically, and under the 1972 amendments, standing at coroner's inquests seems to have been defined more narrowly than at public inquiries. For example, prisoners and inmate committees have been denied standing at inquests into the death of a fellow prisoner in the institution in which they reside, and the courts have deferred to these rulings. See *Re Inmates Committee of the Prison for Women* (1980), 55 C.C.C. (3d) 308 (Ont. H.C.J.).

82 Anthony and Lucas, *supra*, note 28, at 183.

83 For an argument that there might be such a residual power, see Roman, "Annotation" (1985), 8 Admin. L.R. 251, at 252, and Manson, *supra*, note 81, at 660-66.

It has been argued that commissioners often define standing quite broadly and give all significant parties before an inquiry a right of cross-examination.[84] However, this can result in considerable duplication and delay if counsel do not make every effort to coordinate cross-examination. We now turn to consider several cases dealing with the interpretation of section 5(1), in which individuals or groups were denied the right to call evidence and cross-examine witnesses.

In *Re Royal Commission on Conduct of Waste Management Inc.*,[85] the Divisional Court held that a commissioner, examining alleged corruption with respect to a land-fill application before the Environmental Hearing Board, erred in denying standing to a person who lived adjacent to the proposed land-fill site. This person had a traditional interest in allegations of corruption that, if proven, would have affected his property.[86]

The court further held that an interest group, "Protect Our Water Resources", also had a direct and substantial interest because of allegations made by the group about the fairness and integrity of the Environmental Hearing Board. The court stated that "[t]heir interest lies in the integrity of the inquiry by the Board and its possible impairment by the influence of the alleged corruption".[87] However, the court did not grant standing to two principal officers of the organization in their individual or personal capacities, and added that the organization should be represented at the commission by one person, with or without counsel.[88]

The issue of standing was raised again when a commissioner examining the northern environment denied standing to The Grand Council, Treaty No. 9, which represented forty different Ojibway and Cree bands, comprising approximately 20,000 people, and to the Red Lake Chamber of Commerce. Linden J. stated that to qualify under section 5(1) a person "must establish to the satisfaction of the commissioner (reviewable by this court) that he has more than just a general interest, but that he has a direct and substantial interest".[89] Mr. Justice Linden found that these groups satisfied that test. He noted that granting them standing did not mean necessarily that they should be funded or have unlimited rights to cross-examination. He also stressed that the commission

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84 Anthony and Lucas, *supra*, note 28, at 91-96.

85 (1977), 17 O.R. (2d) 207, 80 D.L.R. (3d) 76 (Div. Ct.) (subsequent references are to 17 O.R. (2d)).

86 *Ibid.*, at 210.

87 *Ibid.*, at 211.

88 *Ibid.*

89 *Re Royal Commission on the Northern Environment*, *supra*, note 79, at 421.

retained discretion over procedures despite the powers that were granted in section 5(1) to call evidence and cross-examine witnesses. He concluded as follows:[90]

> [H]olding that the council has standing, in general, does not mean that every single time the council wishes to produce a witness or ask a question in cross-examination that they have the right to do so indiscriminately. The commissioner remains in charge of the inquiry. He is in control of its process, thus he is obligated to rule on the relevance of any questions to the interest of the council (or such other individuals as are given standing).
>
> ....
>
> Hence, questions that may be asked are those that would assist the commissioner in his work. Questions that are irrelevant or are merely part of a fishing expedition or are found to be politically motivated might not be permitted. In other words, each of these matters must be dealt with by the commissioner on a situational basis as they arise in the course of his continuing inquiry.

Thus, it appears that the direct and substantial interest standing test can be expanded, in certain circumstances, to allow standing to some groups. Nevertheless it should be recognized that the groups granted standing in this case were not public interest groups with a general policy interest in the subject matter of the inquiry.

The Divisional Court upheld the decision of Mr. Justice Grange, who was inquiring into the circumstances surrounding a number of deaths at the Hospital for Sick Children,[91] to deny standing to the parents of the children for a phase of the inquiry dealing with the police investigation of the deaths.[92] The court agreed with Grange J. that the parents had a direct and substantial interest only in the cause of their children's deaths and not in the subsequent police investigation and charging of Susan Nelles. Southey J. expressed the opinion that the parents might have more than an "academic" and "general" interest if there were allegations that the police had engaged in a "cover-up" of the causes of the deaths,[93] but concluded as follows:[94]

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90 *Ibid.*, at 421-22.

91 See Ontario, *Report of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters* (1984) (hereinafter referred to as the "Grange Commission").

92 *Parents of Babies Gosselin et al. v. Grange* (1984), 8 Admin. L.R. 250, 4 O.A.C. 242 (Div. Ct.) (subsequent references are to 8 Admin. L.R.).

93 *Ibid.*, at 262.

94 *Ibid.*

> [W]hatever interest the parents may have in bringing out the true story respecting the prosecution of Miss Nelles will be much better served by counsel representing the opposing parties who have a practical interest in that matter than it would be by counsel for the parents. These other parties are adversaries in a very real sense, and the hearings have reflected, and will continue to reflect the adversary system in operation. That system is regarded in our legal tradition as the most effective way of determining the truth.

This decision has been criticized for its interpretation of the standing test embodied in section 5(1), that is, "a substantial and direct interest in the subject matter of its inquiry". It was suggested that "[i]t is unclear...whether an inquiry can treat 'the subject matter of its inquiry' as if it were two separate inquiries, with different rights in each. It is at least an arguable proposition that there is but a single inquiry and one either has standing in *the* inquiry or not."[95] The decision has also been criticized for ignoring the parents' emotional interests in the police investigation of the deaths.[96] Nevertheless, the decision is consistent with the others surveyed above in holding that section 5(1) requires more than a general interest in the subject matter of the inquiry

(c) NOTICE

Section 5(2) of the *Public Inquiries Act*,[97] provides as follows:

> 5.—(2) No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.

Section 5(2) governs when an inquiry is required to give a person notice of alleged misconduct and an opportunity to respond. It refers only to findings of misconduct in the report of a commission, not to allegations that may arise during public hearings. It has been interpreted to apply to a narrower range of people than those who, under section 5(1), have a substantial and direct interest in the subject matter of an inquiry.[98] Moreover, section 5(2) does not address the crucial issue of when notice of misconduct must be received. All that the section would appear to require is that notice be given some time before the report is written and that the person who is found to have engaged in misconduct be "allowed full opportunity during the inquiry to be heard in person or by

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95 Roman, *supra*, note 83, at 252 (emphasis in original).

96 *Ibid.*, at 252-53.

97 *Supra*, note 1.

98 *Re Royal Commission on Conduct of Waste Management Inc.*, *supra*, note 85, at 208-09.

counsel". Thus, the Act does not provide explicitly that a person must have an opportunity to know and meet the case against him.

The leading Canadian case dealing with the requirements of notice in the context of public inquiries is *Landreville v. The Queen*.[99] In that case, Collier J. found that an inquiry into the conduct of then Judge Landreville had violated section 13 of the federal *Inquiries Act*[100] by not giving Landreville reasonable notice and opportunity to respond to certain charges of misconduct, namely that his evidence before a number of tribunals constituted "gross contempt" of their processes. Collier J. found that notice of such charges could not "be said to be included, by implication or necessary intendment, in the [inquiry's] terms of reference",[101] and that before making such findings in its report the commissioner was bound by statute to give Landreville notice of the misconduct, to reconvene the inquiry and allow him the opportunity to meet these charges.[102] This case illustrates the importance of the timing of the notice of misconduct. An individual who has already testified, and is then served with notice of the alleged misconduct, may be prejudiced in the presentation of his best case.

It would appear that section 5(2) contemplates a limited form of disclosure to those who are faced with a finding of misconduct in a commission's report. Such a person, under section 5(2), must receive "reasonable notice of the substance of the alleged misconduct". It is arguable that this requirement might be fulfilled by giving the person only a narrative outline of the allegations, rather than disclosure of specific documents or *in camera* testimony. Thus, with respect to both the extent of the disclosure required and the scope of its application,[103] section 5(2) may provide less protection than will be imposed by the courts under the common law. We now turn, therefore, to the common law requirements of fairness.

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99 [1977] 2 F.C. 726, 75 D.L.R. (3d) 380 (T.D.) (subsequent references are to [1977] 2 F.C.).

100 R.S.C. 1952, c. 152. Section 13 of the present *Inquiries Act*, *supra*, note 5, which is essentially identical, provides as follows:

> 13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

101 *Landreville v. The Queen*, *supra*, note 99, at 757.

102 *Ibid.*, at 758.

103 The protection afforded by the section is available only to those who will be faced with a finding of misconduct in a commission's report.

(d) FAIRNESS

In addition to the specific standing and notice rights contained in section 5 of the Act, courts have been more willing in recent years to impose common law duties of fairness on public inquiries. Before the late 1970s, courts held that because public inquiries were advisory bodies only and did not make actual decisions, the rules of natural justice did not apply to their proceedings.[104] For example, in the 1935 case of *St. John v. Fraser*,[105] the Supreme Court of Canada held that there was no right of cross-examination of any witness in an investigation under the *Securities Frauds Prevention Act*[106] because even though the investigation might affect the status and reputation of witnesses, it did not make quasi-judicial decisions affecting their rights. Similarly, in 1965 the Supreme Court of Canada held that, even under the *Canadian Bill of Rights*,[107] a person subject to a tax investigation did not have the right to be present or to be represented by counsel because "no rights and obligations are determined by the person appointed to conduct the investigation".[108]

Starting in the late 1970s, however, Canadian courts began to reject the distinction between quasi-judicial functions, which were subject to judicial review, and administrative decisions, which were not subject to such review. This is known as the "fairness revolution". The courts now apply a flexible duty of fairness regardless of the classification of the function being exercised. In *Re Abel and Advisory Review Board*,[109] the Ontario Court of Appeal held that the principle that a party must have an adequate opportunity of knowing the case to be met applied to the conduct of an Advisory Review Board under the *Mental Health Act*,[110] even though the decision of that board as to the release of an individual was advisory only. The court noted that, although not binding, the advisory committee's decision offered the only hope for release. In a few subsequent cases, courts have applied the doctrine of fairness to inquiries.

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104 Howe, "The Applicability of the Rules of Natural Justice to Investigatory and Recommendatory Functions" (1974), 12 Osgoode Hall L.J. 179.

105 *Supra*, note 63.

106 S.B.C. 1930, c. 64.

107 S.C. 1960, c. 44.

108 *Guay v. Lafleur*, [1965] S.C.R. 12, at 16, 47 D.L.R. (2d) 226, at 231.

109 (1980), 31 O.R. (2d) 520, 119 D.L.R. (3d) 101 (C.A.).

110 R.S.O. 1970, c. 269.

The Quebec Court of Appeal has held that the doctrine of fairness applies to inquiries, even though they do not make final determinations of legal rights.[111] Malouf J.A. stated:[112]

> One of the basic rules of natural justice stipulates that the person who is the object of such an inquiry should be informed of the complaints against him and should have ample opportunity to reply to these allegations.
>
> ....
>
> There is no doubt that the appellant who is the object of this inquiry had the right to be present and be represented during all the hearings held by the commission. The appellant can call its own witnesses, submit written evidence, submit documents, and cross-examine the other witnesses.

In Ontario, these rights would be available under section 5(1) of the *Public Inquiries Act*,[113] once it is determined that "the person has a substantial and direct interest in the subject-matter of [the] inquiry".

The Privy Council has held that the duty of fairness requires that a public inquiry base its findings "upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory".[114] In addition to this minimal requirement, the Privy Council held that inquiries were subject to a common law duty to give notice. Lord Diplock stated:[115]

> [A]ny person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

In the result, the Privy Council held that a New Zealand commission of inquiry had violated the rules of natural justice by making a finding that an airline had engaged in "an orchestrated litany of lies" without giving advance notice of this conclusion.

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111 *Fraternité Inter-Provinciale des Ouvriers en Electricité v. Office de la Construction du Québec* (1983), 148 D.L.R. (3d) 626 (Que. C.A.).

112 *Ibid.*, at 641-42.

113 *Supra*, note 1. Section 5(1) is reproduced *supra*, this ch., sec. 3(b).

114 *Mahon v. Air New Zealand Ltd.*, [1984] A.C. 808 (P.C.), at 821 (emphasis in original).

115 *Ibid.* (emphasis in original).

More recently, the Federal Court of Appeal held that the duty of fairness required a commission of inquiry investigating war criminals in Canada to disclose to the B'Nai Brith, a party granted standing at the inquiry, expert legal opinions from a working group concerning the possibility of prosecution of suspected war criminals.[116] Mahoney J. stated:[117]

> While there is, of course, no *lis* between the commission and any of the parties granted standing before it, it is pure sophistry to suggest that the opinions of its working group are not certain to be a significant part of the case against the interests of one or more of the appellant and others granted standing. It cannot be said that the opportunity afforded the appellant and other interested parties to present their own views and comment on the views of others fulfils the duty of fairness absent the opportunity to comment on the opinions of the independent experts.
>
> It is trite law that what is required to discharge the duty of fairness varies with the circumstances of each case. In the present circumstances, I am satisfied that the opportunity to comment on the working group's reports is required. Fairness does not, however, in my opinion, demand that opportunities be afforded for further comment on the comments others may make on those reports.

This case illustrates how the common law doctrine of fairness might supplement the statutory rights provided to those affected by public inquiries. Arguably, this form of disclosure would not be required under section 5(2) of the *Public Inquiries Act*,[118] yet courts may impose it as a matter of the common law obligation to act fairly.

As has been noted, the common law doctrine of fairness adjusts to the particular circumstances. The fact that public inquiries issue advice only, and do not make final decisions, will be relevant in determining the content of the duty of fairness, although it is no longer determinative of the issue whether the courts will intervene. Similarly, the fact that inquiries result in public reports argues in favour of procedural rights, such as disclosure and access to counsel, because of the prejudice that might be suffered by an individual criticized in a report. This is especially true since the findings of an inquiry cannot be appealed.

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116 *Re League for Human Rights of B'Nai Brith Canada and Commission of Inquiry on War Criminals* (1986), 28 D.L.R. (4th) 264, 69 N.R. 110 (F.C.A.) (subsequent references are to 28 D.L.R. (4th)).

117 *Ibid.*, at 267-68.

118 Section 5(2) is reproduced *supra*, this ch., sec. 3(c).

Recently, in holding that fairness does not require the right to cross-examine witnesses at a private inquiry under the *Combines Investigation Act*,[119] the Supreme Court of Canada noted as follows:[120]

> Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel. The investigating body must control its own procedure. When that body has determinative powers, different considerations enter the process. The case against the investigated must be made known to him.

Thus, it is clear that, in addition to the statutory requirements of section 5 of the present Act, the courts are prepared to enforce a general and flexible duty of fairness on the investigatory activities of public inquiries.

4. COMPELLING TESTIMONY AND THE PRODUCTION OF EVIDENCE

The constitutionality of the powers to summons witnesses and compel testimony and/or the production of documents and other things will be assessed in the next chapter. In this chapter we review briefly the present statutory law.

Section 7(1) of the *Public Inquiries Act*[121] allows any commission appointed under the Act to require any person by summons to give evidence under oath or affirmation at an inquiry or to produce documents and things as the commission may specify.[122] Under section 8 of the Act, the commission may state a case to the Divisional Court for the refusal to obey such summons, and that court can punish a person as if that person had been guilty of contempt of

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119 R.S.C. 1970, c. C-23.

120 *Irvine v. Canada (Restrictive Trade Practices Commission)*, *supra*, note 68, at 231.

121 *Supra*, note 1.

122 Section 7(1) provides as follows:

> 7.—(1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

court.[123] These specific statutory powers and judicial enforcement procedures emerged from the 1971 reforms,[124] discussed above.[125] Prior to that time, a commissioner had "the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases".[126] Following the recommendations of the McRuer Report,[127] provision was made for a standard form of summons to a witness,[128] the payment of witness fees[129] and the return of documents "within a reasonable time".[130] Moreover, the reforms implemented the McRuer Report recommendations[131] that investigatory bodies should not have the power to commit witnesses for disobedience of a summons because the courts, as bodies independent from the act of disobedience, were better suited to protect the liberty and security interests of individuals.[132]

Statement of a case for contempt to the Divisional Court under section 8 of the Act functions as an information that is *prima facie*, although not conclusive, proof of the guilt of the accused in disobeying the summons. However, the language of section 8 makes it clear that a person can be punished under the

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123 Section 8 provides as follows:

> 8. Where any person without lawful excuse,
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> (a) on being duly summoned under section 7 as a witness at an inquiry, makes default in attending at the inquiry; or
>
> (b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the commission to be taken or made, or to produce any document or thing in his or her power or control legally required by the commission to be produced to it, or to answer any question to which the commission may legally require an answer; or
>
> (c) does any other thing that would, if the commission had been a court of law having power to commit for contempt, have been contempt of that court,
>
> the commission may state a case to the Divisional Court setting out the facts and that court may, on the application of the commission or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defense, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

124 *Public Inquiries Act, 1971*, *supra*, note 2.

125 *Supra*, this ch., sec. 1.

126 *The Public Inquiries Act*, *supra*, note 6, s. 2.

127 *Supra*, note 3.

128 *Public Inquiries Act*, *supra*, note 1, s. 7(2).

129 *Ibid.*

130 *Ibid.*, s. 12(1).

131 McRuer Report, *supra*, note 3, at 432-46.

132 See s. 8 of the *Public Inquiries Act*, *supra*, note 1, reproduced *supra*, note 123.

section only if the person acted without "lawful excuse". In *Re Yanover and The Queen*,[133] the Ontario Court of Appeal interpreted section 8 to allow the accused to have an issue that is claimed to be a lawful excuse decided by the Divisional Court before the imposition of punishment is considered. In that case, Estey J.A. stated:[134]

> The Divisional Court, being required to inquire, must give the person affected an opportunity to be heard and thereafter it must come to the conclusion judicially that there has been a refusal to comply with the Commission's lawful requirements and that there was no lawful excuse for the refusal.

Thus, consistent with the legislative purpose of separating the process of punishment for failure to comply with a commission's summons from the activities of the commission itself, a recalcitrant witness will have the benefit of an independent determination of both the question whether the person is guilty of contempt and the question whether the person had any lawful excuse. In short, an inquiry has neither judicial nor punitive powers to convict a witness of contempt of its orders.[135] As has been recently noted:[136]

> The Ontario regime, therefore, lends itself to a practical form of judicial review, generally casting the onus on the commission to invoke the powers of the court, and thereby affording the aggrieved parties an opportunity to test the commission's jurisdiction before extraordinary powers are exercised against them.

As noted above, punishment for contempt will be imposed by the court only if the witness does not have a "lawful excuse". We now turn to consider the meaning of this phrase. It should be noted, however, that the reference in section 8 to "lawful excuse" incorporates an open-ended and evolving concept. For example, in *Re Yanover and The Queen*,[137] the Ontario Court of Appeal interpreted "lawful excuse" to include good faith reliance on a legal argument made on a stated case to the Divisional Court, provided the witness did not make the argument for ulterior purposes such as delaying the proceedings and provided the witness was prepared to accept the ultimate decision of the Divisional Court. In another case,[138] a witness refused to testify because of the widespread publicity

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133 (1974), 6 O.R. (2d) 478, 53 D.L.R. (3d) 241 (C.A.) (subsequent references are to 6 O.R. (2d).

134 *Ibid.*, at 483.

135 *Ibid.*, at 482-83.

136 Scott, "The Rights and Obligations of Those Subject to Inquiry and of Witnesses", in Pross, Christie, and Yogis, *supra*, note 53, 134, at 139.

137 *Supra*, note 133.

138 *Re Royal Commission on Certain Sectors of the Building Industry* (1973), 1 O.R. (2d) 699 (Div. Ct.).

given to the inquiry proceedings. This was rejected as a lawful excuse after it was determined by the Divisional Court that the witness had also refused to testify in *in camera* proceedings.

In a recent case,[139] a person who refused to testify before the Niagara Regional Police Force inquiry argued that his refusal was not without lawful excuse, because various of his rights under the Charter would be violated if he were required to testify without being granted standing or the right to counsel. The Divisional Court held that he was not entitled to standing and counsel rights because he was before the commission solely to testify, and did not face the prospect of adverse findings. Despite its ultimate conclusion, this decision demonstrates how Charter protections might be incorporated into the evolving concept of "lawful excuse" in order to provide for the protection of an individual's rights. Similarly, a lawful excuse for a refusal to testify would include evolving claims of privileges, discussed in the next section.

5. EVIDENTIARY RULES AND PRIVILEGES

A commission appointed under the *Public Inquiries Act* has the power to administer oaths and hear evidence under oath, as well as the power to admit evidence not given under oath or affirmation.[140] The flexibility of the Act in this respect reflects the perceived need to ensure that commissions of inquiry are not constrained by the strict laws of evidence. As early as 1922, courts have held that the admissibility of evidence at a public inquiry should not "be governed by the strict rules of evidence" but rather by a broad test of "whether or not its admission appears to be in the public interest".[141] Thus, for example, the admission of hearsay evidence might fulfil a public purpose by allowing commissions to assess the validity and extent of rumours, and thereby report on the extent of a public controversy. In *Re Bortolotti and Ministry of Housing*,[142] the Ontario Court of Appeal affirmed that public inquiries are not bound by the rules of evidence applied in courts. It was held that "any evidence should be admissible before the Commission which is reasonably relevant to the subject-

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139 *Royal Commission (Niagara Regional Police Force Inquiry) v. DeMarco* (1990), 36 O.A.C. 387 (Div. Ct.).

140 Sections 10 and 13 of the *Public Inquiries Act*, *supra*, note 1, provide as follows:

> 10. A commission may admit at an inquiry evidence not given under oath or affirmation.
>
> 13. A commission has power to administer oaths and affirmations for the purpose of an inquiry and may require evidence before it to be given under oath or affirmation.

141 *Re Huston* (1922), 52 O.L.R. 444 (App. Div.), at 448 .

142 (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A.) (subsequent references are to 15 O.R. (2d)).

matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*".[143]

The most important provision in the *Public Inquiries Act* affecting the admissibility of evidence is section 11, which provides as follows:

> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

Added in the 1971 reforms,[144] discussed above,[145] this provision incorporates an evolving set of common law privileges into the public inquiry process. By this means, section 11 places significant limits and safeguards on the power of inquiries to compel testimony and the production of documents.

The applicability of the police informer privilege at an inquiry concerning the confidentiality of health records was litigated all the way to the Supreme Court of Canada. The commission itself and the Ontario Court of Appeal held that the privilege did not apply because the informers, in this case doctors, were under a legal duty not to disclose medical records.[146] The Supreme Court of Canada held that there was no legal duty not to disclose the records and that the Crown should be able to claim privilege to protect police informers.[147] Laskin C.J.C. (Dickson J. concurring), in dissent, stressed that the privilege had a different applicability in the public inquiry context than in criminal prosecutions because of the inquiry's "dominant public interest going beyond any particular case and aiming at recommendations which may be the basis of legislative reform".[148] On the other hand, Martland J. for the majority stated that the public policy behind the privilege was the same whether it was applied in criminal prosecutions, civil suits for malicious prosecutions, or public inquiry proceedings.[149] He concluded:[150]

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143 *Ibid.*, at 624.

144 *Public Inquiries Act, 1971*, *supra*, note 2.

145 *Supra*, this ch., sec. 1.

146 *Re Inquiry into the Confidentiality of Health Records in Ontario* (1979), 24 O.R. (2d) 545, 98 D.L.R. (3d) 704 (C.A.); rev'd *infra*, note 147.

147 *Solicitor General of Canada v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario*, [1981] 2 S.C.R. 494, 128 D.L.R. (3d) 193 (subsequent references are to [1981] 2 S.C.R.).

148 *Ibid.*, at 523-24.

149 *Ibid.*, at 531.

150 *Ibid.*, at 539.

> *The Public Inquiries Act, 1971* does not confer on the Commissioner any wider powers than those which may be exercised, on application of a party, by a judge conducting judicial proceedings. The police-informer privilege is not in any way diminished by any provision of *The Public Inquiries Act, 1971*. On the contrary, s.11 of the Act specifically provides that nothing is admissible in evidence at any inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

The role of the common law of privilege in preventing public inquiries from compelling the production of information that would otherwise not be disclosed, was reaffirmed by the Supreme Court of Canada in the recent decision in *MacKeigan v. Hickman*.[151] In that case, the court held that, in the absence of explicit statutory authorization in Nova Scotia's *Public Inquiries Act*,[152] the common law protections of judicial independence prevented the inquiry from requiring members of an appellate court to testify with respect to the basis for their decision in a particular case, the composition of the record that was before the court in that case, and the reason for inclusion of a particular judge on the panel. Because of the structure of the Nova Scotia Act, the case involved an interpretation of the powers of the inquiry to compel testimony. However, it is likely that the court would have reached the same decision, and arguably more directly, under a provision such as section 11 of the Ontario Act, which binds inquiries directly by the common law of privilege. Another noteworthy feature of this case is that it was decided as a preliminary challenge to the issue of subpoenas to the judges; it did not emerge from a challenge of a contempt committal. Again, the Ontario procedure would provide similar protections, although it would do so through the stated case procedure contemplated under section 8, discussed above.[153]

6. PUBLICITY AND *IN CAMERA* HEARINGS

The public nature of the proceedings of most public inquiries is a crucial feature. Recent decisions to televise inquiry proceedings have heightened the role of publicity in the inquiry process and have raised concerns about the fairness of inquiries to those who are forced to testify before the cameras. On the other hand, as was noted in the previous chapter, visibility is often a crucial feature in a public inquiry's social function.

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151 [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688.

152 R.S.N.S. 1967, c. 250.

153 *Supra*, this ch., sec. 4.

It should be noted that the decision to televise proceedings is not governed by the terms of the Act; rather it is made on an inquiry-by-inquiry basis, as part of each commission's general discretion to determine its own procedures.[154]

Section 4 of the *Public Inquiries Act* provides general guidelines with respect to publicity and hearings in the following terms:

> 4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
>
> (a) matters involving public security may be disclosed at the hearing; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matters in the absence of the public.

This provision has not been the source of direct litigation, despite the important effects of deciding whether the hearings of inquiries should be open or closed. In large part, this can be explained by the fact that section 4 places no obligation on a commission to conduct hearings *in camera*, even where they are dealing with intimate financial or personal matters, where the interest of the person affected outweighs the interest in public hearings. Section 4 gives the inquiry a discretion to conduct *in camera* proceedings in a narrow range of cases only.

Section 4 of the Act, however, has been the subject of some indirect judicial commentary. In *Re Yanover and The Queen*,[155] in the course of determining whether a witness failed to testify without lawful excuse, the Ontario Court of Appeal stated that a public inquiry was not prevented from considering matters in a public hearing that had been considered previously in an *in camera* hearing. The court's decision upheld the inquiry's discretion over its own procedures, but expressed general support for public hearings by suggesting that a failure to deal with important matters in public would "defeat the very purpose of the establishment of the Commission of Inquiry under the statute" and "effectively amend the terms of reference constituting the inquiry and the

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154 See s. 3 of the *Public Inquiries Act*, *supra*, note 1, reproduced *supra*, text accompanying note 57.

155 *Supra*, note 133.

statute so as to delete from public hearings any matters so considered *in camera*".[156] In another case,[157] the Divisional Court held that a witness who did not want to testify in public did not have a lawful excuse. They were prepared to impose a $500 fine and a three-month term of imprisonment, but in deference to the commission's discretion over its own procedure, left the commission to decide whether the recalcitrant witness should be questioned in a public or *in camera* session.

The use of the power to hold *in camera* hearings was contemplated by Chief Justice Laskin in his dissent in *Solicitor General of Canada v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario*,[158] discussed earlier.[159] Laskin C.J.C. stated that, while the public interest purposes of a public inquiry meant that the police informer privilege did not bind the inquiry, an inquiry could, under section 4 of the Act, conduct its hearings *in camera* so as to protect public security in limiting the publicity of the names of police informers. Had the privilege not applied, this would arguably be a situation in which it would be appropriate for a commission to conduct its proceedings *in camera*.

On the other hand, the power to hold *in camera* proceedings may conflict with the common law rights of a person affected by the inquiry to be present and hear evidence and to cross-examine witnesses.[160] Thus, care must be taken not to exclude vital participants from *in camera* proceedings. Moreover, any exercise of the statutory power to close proceedings might be subject to a challenge under the Charter. It is relatively clear from the broad meaning that has been given to the scope of freedom of expression that an inquiry that exercised its powers to hold hearings *in camera* would be found to have violated section 2(*b*) of the Charter. The question would then be whether section 4 of the *Public Inquiries Act* places a reasonable limit on that freedom, within section 1 of the Charter.

In *Canadian Newspapers Co. Ltd. v. Canada (Attorney General)*,[161] the Supreme Court of Canada held that a *Criminal Code* provision[162] prohibiting the publication of a sexual assault complainant's identity was justified as a reasonable measure to increase the reporting of crimes of sexual violence. In

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156 *Ibid.*, at 491.

157 *Re Royal Commission on Certain Sectors of the Building Industry*, *supra*, note 138.

158 *Supra*, note 147.

159 *Supra*, this ch., sec. 5

160 *Fraternité Inter-Provinciale des Ouvriers en Electricité v. Office de la Construction du Québec*, *supra*, note 111.

161 [1988] 2 S.C.R. 122, 52 D.L.R. (4th) 690.

162 *Criminal Code*, R.S.C. 1970, c. C-34, s. 442(3), as am. by 1980-81-82-83, c. 125, s. 5.

Edmonton Journal v. Alberta (Attorney General),[163] the court held, in a 4:3 decision, that a provision limiting the publication of evidence and pleadings in divorce cases was not a justified limit on freedom of expression. The court recognized that the provision was designed to protect both the privacy and fair trial interests of individuals and that these interests are pressing and substantial in a free and democratic society. The majority of the court held, however, that the legislation did not advance these interests in a proportionate manner, infringing freedom of expression as little as possible. The impugned Act placed a wholesale ban on the publication of evidence, rather than allowing less intrusive options such as publication of the evidence but not the identity of parties, or a discretion in the trial judge to decide when *in camera* hearings might be necessary.[164] Three judges dissented on the grounds that, although a prohibition against publishing any pleadings was too broad, the prohibition against publicizing the details of evidence was a justifiable measure to protect the privacy of individuals.

Section 4 of the Act is carefully tailored. It circumscribes quite narrowly those situations in which an *in camera* hearing might be appropriate and, except with respect to matters involving public security, it requires the commission to conclude that the need to limit disclosure "outweighs the desirability of adhering to the principle that hearings be open to the public". Even in such limited circumstances, a commission still has a discretion not to hold proceedings *in camera*.

One issue that arises is whether section 4 is too limited, in that it does not include, as a ground for closure of an inquiry's hearings or the issuance of a publication ban, such matters as the prejudice that an individual might suffer in subsequent proceedings. It might be argued that the effect that the publicity surrounding a public inquiry might have on the subsequent ability to hold a fair trial should be an important consideration. By way of analogy, it should be noted that the *Criminal Code*[165] provides that evidence taken at a preliminary inquiry shall not be published in any newspaper or broadcast at any time until an accused is either discharged or the trial ended.[166]

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163 [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 (subsequent references are to [1989] 2 S.C.R.)

164 *Ibid.*, at 1346-47.

165 R.S.C. 1985, c. C-46.

166 *Ibid.*, s. 539(1)(*b*). This section has withstood Charter review. See *R. v. Banville* (1983), 45 N.B.R. (2d) 134, 145 D.L.R. (3d) 595 (Q.B.). See, also, *Edmonton Journal v. Attorney General of Alberta* (1983), 28 Alta. L.R. (2d) 369, 5 D.L.R. (4th) 240 (Q.B.), aff'd 37 Alta. L.R. (2d) 287, 13 D.L.R. (4th) 479, leave to appeal to S.C.C. refused 17 C.R.R. 100*n* (S.C.C.), upholding *in camera* hearings into a death into the *Fatality Inquiries Act*, R.S.A. 1980, c. F-6.

In *R. v. Burke*,[167] the accused, a former Christian brother, argued that he could not receive a fair trial because of publicity surrounding the circumstances of his alleged crime of sexual abuse. The accused argued that much of the publicity arose out of the Hughes Inquiry[168] into events at the Mount Cashel Orphanage and had left members of the public with the impression that a judge had already made determinations of guilt. This pre-trial motion was rejected, in large part on the basis that the jury should be presumed to be capable of putting aside information received outside the courtroom and deciding impartially on the basis of the evidence presented to it. After this decision, the accused re-elected to be tried to by a judge alone, thus indicating a certain scepticism about the ability of jurors to divorce themselves from the pre-trial publicity and impressions fostered by a highly publicized public inquiry.

7. POWERS UNDER PART III OF THE *PUBLIC INQUIRIES ACT*: APPREHENSION AND DETENTION OF WITNESSES, AND SEARCH AND SEIZURE OF DOCUMENTS AND OTHER EVIDENCE

In addition to the powers to compel testimony and the production of documents, inquiries appointed under the *Public Inquiries Act*[169] can be invested with the power to apprehend and detain witnesses, and to search and seize documents and other evidence, under Part III of the Act. It should be emphasized, however, that these powers are not made available to all inquiries. From 1975 to 1990, Part III was declared to apply to only eight of thirty inquiries appointed under the Act. Moreover, there is no reported case of their use. The constitutionality of these exceptional powers under the Charter will be reviewed in the next chapter. In this section we provide a brief outline of their nature.

First, it should be noted that the powers contained in Part III of the Act apply only if the Lieutenant Governor in Council declares Part III to apply to a particular inquiry.[170] Once Part III has been declared to apply, the powers set out

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167 Unreported (June 3, 1991, Nfld. S.C., T.D.), applying *R. v. Vermette*, [1988] 1 S.C.R. 985, 50 D.L.R. (4th) 385, and *R. v. Sherratt*, [1991] 1 S.C.R. 509, 73 Man. R. (2d) 161.

168 Newfoundland, Royal Commission of Inquiry into the Response of Newfoundland's Justice System to Complaints (1991) (report not yet released).

169 *Supra*, note 1.

170 Section 15 of the *Public Inquiries Act*, *supra*, note 1, provides as follows:

> 15.—(1) This Part does not apply to an inquiry unless the Lieutenant Governor in Council declares that this Part does apply thereto.
>
> (2) The Lieutenant Governor in Council may, if he or she is satisfied that it is necessary to achieve the purposes of an inquiry, in the order in council authorizing

in sections 16 and 17 become available. Section 16 provides for the issue of a warrant, by a judge of the Ontario Court (General Division), to apprehend and detain a person who has been summoned by the commission and who has failed to attend.[171] In addition to the requirement for prior judicial authorization, before a recalcitrant witness can be apprehended and detained the commission must prove that the person failed to attend in accordance with the requirements of a summons, that the person has been paid "a sufficient sum for...fees and allowances" and, most importantly, that the person's presence is "material to achievement of the purposes of the inquiry".[172]

Section 17 of the Act provides for the issue of a warrant authorizing a search to be made, and the removal of documents or other things relevant to the inquiry.[173] The section allows a person appointed to make an investigation

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the issue of the commission for the inquiry, or by a subsequent order in council, declare that this Part applies to the inquiry and to the commission conducting it.

171 Section 16 of the *Public Inquiries Act, supra*, note 1, provides as follows:

16.—(1) Upon proof to the satisfaction of a judge of the Ontario Court (General Division) of the service of a summons to appear at an inquiry upon a person and that,

(a) such person has failed to attend or to remain in attendance at the inquiry in accordance with the requirements of the summons;

(b) a sufficient sum for his or her fees and allowances has been duly paid or tendered to the person; and

(c) his or her presence is material to achievement of the purposes of the inquiry,

the judge may, by warrant in Form 2 directed to any sheriff or police officer, cause such person to be apprehended anywhere within Ontario and forthwith to be brought before the commission conducting the inquiry and to be detained in custody as the judge may order until his or her presence as a witness before the inquiry is no longer required, or, in the discretion of the judge, to be released on a recognizance, with or without sureties, conditioned for appearance to give evidence.

(2) An application under subsection (1) may be made by the commission conducting the inquiry and the service of the summons and payment or tender of fees and allowances may be proved by affidavit.

172 *Public Inquiries Act, supra*, note 1, s. 16(1).

173 Section 17 provides as follows:

17.—(1) A commission may in writing appoint a person to make an investigation relevant to the subject-matter of the inquiry it is conducting.

(2) Where a judge of the Ontario Court (General Division) is satisfied upon an application made without notice by a person appointed by a commission to make an investigation under this section,

(a) that the commission conducting the inquiry has appointed the applicant to make an investigation under this section; and

relevant to the subject matter of the inquiry to apply to a judge to obtain a warrant authorizing the person to enter and search "any building, receptacle or place, including a dwelling house" where "there are reasonable grounds for believing that there are...any documents or things relevant to the subject-matter of the inquiry".[174] Thus, it would appear that the criteria for searches and seizures under section 17 are less stringent than those for apprehension and detention of witnesses under section 16. It is not necessary, under section 17, to demonstrate that a summons would fail to obtain production of the documents. Moreover, a person can be apprehended and detained under section 16 only on the grounds of materiality, whereas documents and other things can be seized under section 17 on the broader grounds of relevance.

The above powers are quite unique. One commentator has suggested that they provide "an extraordinary and rarely used power. The failure of other schemes to provide an equivalent and power is both noteworthy and deliberate."[175]

(b) that there are reasonable grounds for believing that there are in any building, receptacle or place, including a dwelling house, any documents or things relevant to the subject-matter of the inquiry,

the judge may issue a warrant in Form 3 authorizing the person making the investigation, together with such police officers as he or she calls upon to assist him or her, to enter and search if necessary by force, such building, receptacle or place, for such documents or things.

(3) A person making an investigation under this section may, upon giving a receipt therefor, remove any document or thing found in his or her investigation relevant to the subject-matter of the inquiry and deliver it to the commission which shall keep custody of it.

(4) Documents and things delivered to a commission by a person appointed to make an investigation under this section shall upon request of the person from whose custody they were removed or the person entitled thereto be released to the person by the commission within a reasonable time.

(5) Where a document has been delivered to a commission by a person making an investigation under this section, the commission may cause the document to be photocopied and the photocopy may be filed in evidence in place of the document delivered to the commission and a copy of such document certified by the commission to be a true copy thereof, is admissible in evidence in proceedings in which the document so delivered is admissible, as evidence of the document so delivered.

174 *Ibid.*, s. 17(2). There are provisions for photocopying documents and returning documents and things in a reasonable time similar to those that apply to documents and things produced under a summons.

175 Scott, *supra*, note 136, at 140.

8. JUDICIAL REVIEW

Judicial review of the appointment and decisions of public inquiries has been readily available, even before the 1971 reforms, by way of a stated case procedure. Prior to 1971, the Act required a commission to state a case to the Court of Appeal whenever "any person affected" called into question "the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner".[176] The decision of the Court of Appeal was final and binding, and the court interpreted its powers of review quite broadly. For example, in *Re The Ontario Crime Commission; Ex parte Feeley*,[177] Schroeder J.A. held as follows:[178]

> [T]he Court of Appeal is entitled to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction with respect thereto is called into question. It is no answer to say that a Royal Commissioner's ruling upon such a question is an administrative determination and as such is not reviewable, because the language of s. 5 is broad enough to confer upon the Court of Appeal the power and the duty to review even administrative determinations....
>
> The wide power conferred on the Court of Appeal by s. 5 also invests it with authority to review decisions, orders or directions made in the exercise of the Commissioner's discretion. If the Legislature had intended to restrict the Court's powers within narrower limits it could and would have used appropriate language to make that purpose clear.

Thus, public inquiries in Ontario were subject to judicial review even though their activities would not have been subject to such review in the absence of a statutory stated case procedure, since they would have been classified as administrative, as opposed to quasi-judicial, according to the administrative law doctrine of the time. This anomaly allowed the Ontario courts to develop a distinctive jurisprudence with respect to public inquiries,[179] whereas courts in other jurisdictions applying common law principles generally declined to intervene.[180]

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176 *The Public Inquiries Act*, *supra*, note 6, s. 5(1).

177 *Supra*, note 64.

178 *Ibid.*, at 895.

179 See, for example, *Re Ontario Crime Commission*, *supra*, note 35, and *Re Public Inquiries Act and Shulman*, *supra*, note 66.

180 The Supreme Court has noted the distinctiveness of the Ontario jurisprudence. See *Irvine v. Canada (Restrictive Trade Practices Commission)*, *supra*, note 68, at 229-30.

The 1971 amendments to the *Public Inquiries Act*[181] appear to have limited the availability of judicial review, and narrowed its scope. The present stated case procedure, in section 6 of the Act,[182] provides that the commission may state a case to the Divisional Court "[w]here the authority to appoint a commission...or the authority of a commission to do any act or thing proposed to be done or done by the commission" is called into question. In *Re Bortolotti and Ministry of Housing*,[183] the Court of Appeal stated that the jurisdiction conferred on the reviewing court by section 6 "is much narrower than the jurisdiction conferred by its predecessor".[184] The Court of Appeal held that the reference to "authority" as opposed to "validity" of a challenged act meant that courts had a supervisory jurisdiction only to determine that a commission of inquiry did not exceed its jurisdiction. Thus, the courts no longer had the power, as it did in *Re The Ontario Crime Commission; Ex parte Feeley*,[185] to substitute its discretion for that of the commission, provided the commission was acting within its jurisdiction. The Court of Appeal determined that it could supervise a commission of inquiry if it refused to admit evidence that is reasonably relevant to the subject matter of the inquiry, or admitted evidence that was not so relevant.[186]

The Court of Appeal also expressed the view that a denial of a statutory right, such as the rights of cross-examination and notice examined above, could

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181 *Public Inquiries Act, 1971, supra*, note 2.

182 Section 6 of the *Public Inquiries Act, supra*, note 1, provides as follows:

> 6.—(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.
>
> (2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.
>
> (3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.
>
> (4) Pending the decision of the Divisional Court on a case stated under this section, no further proceedings shall be taken by the commission with respect to the subject-matter of the stated case but it may continue its inquiry into matters not in issue in the stated case.

183 *Supra*, note 142. See, also, *Re Royal Commission into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113, 64 D.L.R. (3d) 477 (Div. Ct.).

184 *Re Bortolotti and Ministry of Housing, supra*, note 142, at 623.

185 *Supra*, note 64.

186 *Re Bortolotti and Ministry of Housing, supra*, note 142, at 625.

amount to a jurisdictional error,[187] as would the admission of evidence privileged under the law of evidence and thus inadmissible by virtue of section 11 of the Act.[188]

9. MISCELLANEOUS

There are no provisions in the *Public Inquiries Act*[189] regarding the procedures for the termination of an inquiry, the submission of its report to the Lieutenant Governor in Council, or the publication or release of its report to the public. Some orders in council do provide that a commission either expires on a certain date or must deliver its report by that date. No order in council in Ontario in the last fifteen years has guaranteed publication or public release of a commission's report. Nevertheless, there is certainly a public expectation that the report will be released; indeed, this is a crucial feature of the independence of public inquiries and is among their most important and distinctive attributes.

The *Public Inquiries Act* is also silent with respect to the immunity of commissioners, commission counsel, and witnesses from civil actions arising from the commission's report, or their activities during the course of the inquiry. Unlike the case in some provinces, where commissioners are given the same absolute immunity as judges of the superior court,[190] there is no protection in Ontario against law suits for defamation either for comments made during the course of the inquiry or in its report.[191]

The vulnerability of witnesses, commission counsel, and other lawyers who appear before an inquiry to subsequent civil suits would be determined as a matter of common law. The leading case[192] suggests that the courts will be concerned with the extent to which the proceedings and function of a public inquiry are similar to those of the courts. As Lord Diplock stated:[193]

> [T]o decide whether a tribunal acts in manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under

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187 *Ibid.*, at 625-26.

188 *Ibid.*, at 625.

189 *Supra*, note 1.

190 This would appear to be so regardless of whether they have exceeded their jurisdiction. See *Morier v. Rivard*, [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1. The law elsewhere in Canada is discussed *infra*, ch. 5, sec. 5.

191 *O'Connor v. Waldron*, [1935] A.C. 76, [1934] All E.R. Rep. 281 (P.C.).

192 *Trapp v. Mackie*, [1979] 1 All E.R. 489 (H.L.).

193 *Ibid.*, at 492.

what authority the tribunal acts, secondly, the nature of the question into which it is its duty to inquire, thirdly, the procedure adopted by it in carrying out the inquiry and, fourthly, the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.

CHAPTER 3

PUBLIC INQUIRIES AND THE CONSTITUTION

1. THE DIVISION OF POWERS

(a) INTRODUCTION

In a series of cases, the Supreme Court of Canada has assessed the limits imposed by the constitutional division of powers on provincial jurisdiction to establish public inquiries. In most cases the court has upheld the validity of such inquiries. Even in the latest case,[1] in which the inquiry was held to be beyond provincial jurisdiction, the court indicated that there is substantial scope for such inquiries, provided that they are not employed as a substitute for the ordinary criminal process or as a means of by-passing the protections that process provides.[2]

The limit that has been considered most frequently by the courts is the impact of the federal criminal law power on provincial jurisdiction to establish inquiries. There are, however, two other limits on provincial jurisdiction: (1) a

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1 *Starr v. Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R.(4th) 641 (subsequent references are to [1990] 1 S.C.R.).

2 *Ibid.*, at 1390-91, Lamer J. stated as follows:

> At the outset, it is worth noting that this Court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers. At the same time, however, this Court has consistently held that the power of the provinces to establish commissions of inquiry is not constitutionally unlimited.

Similarly, at 1411, Lamer J. stated:

> It is clear...that provinces should be given ample room within their constitutional competence to establish public inquiries aimed at investigating, studying and recommending changes for the better government of their citizens. What a province may not do...is enact a public inquiry, with all its coercive powers, as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences. This is an interference with federal interests in the enactment of and provision for a system of criminal justice as embodied in the *Criminal Code*. The net effect of such an inquiry is to bypass the protection accorded to an individual by the *Criminal Code* and is accordingly *ultra vires* the province as being a matter relating to s. 91(27) of the *Constitution Act, 1867*.

province cannot authorize an inquiry into the internal management of federal institutions; and (2) a province is limited in conferring on an inquiry authority to exercise judicial powers analogous to those exercised by superior and district courts at the time of Confederation.[3]

This section is concerned primarily with the scope of these limits on provincial jurisdiction. It begins with a consideration of the type of inquiry that attracts "division of powers" analysis, the basis on which such an inquiry is classified for "division of powers" purposes, and the applicability of the aspect doctrine. It also examines the extent to which federal limits have been used as a means of protecting other constitutional values, now addressed in the *Canadian Charter of Rights and Freedoms*,[4] the extent to which the principles of federalism protect certain witnesses from examination by a public inquiry, and the extent to which a province may protect inquiry witnesses against the subsequent use of their testimony in proceedings under federal jurisdiction.

(b) PROVINCIAL JURISDICTION TO ESTABLISH PUBLIC INQUIRIES

(i) Coercive Inquiries and the Division of Powers

A provincial government has the capacity to inquire into any matter whatever,[5] through research projects, task forces, or committees. If, however, the investigation requires coercive powers to compel the attendance of witnesses to testify and produce documents under oath, it must be authorized by statutory authority.[6] Whether a provincial inquiry is established by special statute of the Legislature, or by order in council pursuant to a general statute authorizing the establishment of public inquiries, the nature and scope of the inquiry must be within provincial jurisdiction since "[a] provincial statute cannot be effective beyond the constitutional limits of a provincial Legislature's authority".[7]

It is immaterial that the commission is authorized to make recommendations only, not mandatory orders: "The coercion lies in the instituting and holding of the investigation itself, and it is this coercion, *inter*

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3 *Constitution Act, 1867*, 30-31 Vict., c. 3 (U.K.), s. 96.

4 Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "Charter").

5 See *Attorney General of Quebec* v. *The Attorney General of Canada*, [1979] 1 S.C.R. 218, at 240, 90 D.L.R. (3d) 161, at 178 (subsequent references are to 90 D.L.R. (3d)).

6 *Ibid.* See, also, *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, at 893, 85 N.R. 260, at 290-91 (subsequent references are to [1988] 1 S.C.R.).

7 *Attorney General of Quebec* v. *The Attorney General of Canada*, *supra*, note 5, at 178.

alia, which requires a constitutional justification."[8] Thus, in *Attorney General of Quebec v. The Attorney General of Canada*,[9] where the authority of the investigating commissioner was limited to making recommendations, his power to compel testimony was nonetheless dependent on the constitutional validity of the scope of the inquiry.

(ii) Classifying the Law as Provincial or Federal

In assessing validity, a court must characterize the "matter" of the law establishing the inquiry, by considering its purpose and effect, in order to identify its dominant feature or its "pith and substance".[10] In the Supreme Court of Canada's most recent consideration of the issue, *Starr v. Houlden*, Lamer J., for the majority, described the process of characterization with respect to provincial inquiries as "holistic" rather than "formalistic" or "technical".[11] No single factor is determinative. The court looks to "all the surrounding circumstances of the establishment of the inquiry and...the terms of reference themselves".[12]

In 1978, in *Attorney General of Quebec v. The Attorney General of Canada*,[13] Estey J. articulated a functional analysis of the validity of provincial inquiries. He suggested that such inquiries may be placed along a scale or continuum, with valid inquiries into the administration of justice at one end and invalid intrusions into the federal criminal law and procedure power at the other. He noted that "[e]ach such enterprise when undertaken by a Province must be examined in its own particular circumstances".[14] A majority of the court has now adopted this approach,[15] which is consistent with the accepted approach to characterizing the "matter" of legislation in other constitutional contexts. In characterizing the legislation establishing the provincial inquiry that was at issue

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8 *Canadian National Railway Co. v. Courtois*, *supra*, note 6, at 893.

9 *Supra*, note 5. See, also, *Canadian National Railway Co. v. Courtois*, *supra*, note 6, at 895.

10 *Starr v. Houlden*, *supra*, note 1, at 1389, citing Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 318-19.

11 *Supra*, note 1, at 1405. Note that, at 1427, L'Heureux-Dubé J., dissenting, asserted that the effect of the majority's reasoning was to aggregate several factors, none of which individually exceeded provincial jurisdiction, and to hold that their cumulative effect rendered the inquiry *ultra vires*.

12 *Ibid.*, at 1403.

13 *Supra*, note 5, at 189.

14 *Ibid.*, at 193.

15 See *Starr v. Houlden*, *supra*, note 1, at 1395-96.

in *Starr v. Houlden*,[16] the court considered the legislation and the terms of reference governing the inquiry, public statements made by the premier and other politicians concerning its purposes,[17] and the general factual context in which the inquiry was established.[18] The court then weighed this information in accordance with "judicial precedent and...a 'concept of federalism' comprised of the enduring values in the allocation of power between the two levels of government".[19]

(iii) The Aspect Doctrine

A matter may, in different aspects and for different purposes, fall within the jurisdiction of both the federal and the provincial levels of government. If an inquiry, in pith and substance, relates to a matter within provincial jurisdiction, it may have an incidental impact on matters within federal jurisdiction, through the operation of the "aspect doctrine".[20] Where the inquiry involves an investigation of alleged wrongdoing that might also constitute a criminal offence, it must be determined if the powers conferred on the commission of inquiry have an incidental impact on the federal jurisdiction over criminal law and criminal procedure,[21] or whether they constitute an invalid interference in that area of federal competence.

It should be noted that it is well established, in other contexts, that a province might have a valid constitutional purpose for inquiring into alleged wrongdoing that might also constitute a criminal offence. Thus, for example,

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16 *Ibid.*

17 References to ministerial statements were made in *Re Nelles and Grange* (1984), 46 O.R. (2d) 210, 9 D.L.R. (4th) 79 (C.A.) (subsequent references are to 46 O.R. (2d)); *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527 (subsequent references are to 45 D.L.R. (4th)); and *Starr v. Houlden*, *supra*, note 1. The propriety of considering such statements was not addressed in any of these cases. Note, however, that in *Reference re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, ministerial statements were held admissible for the purpose of assessing the constitutional validity of the legislation.

18 Where an investigator has the statutory power to make mandatory orders, the constitutional validity of the investigative powers should not be assessed in isolation, but should be viewed in the context of the purpose and potential result of the investigation. Thus, in *Canadian National Railway Co. v. Courtois*, *supra*, note 6, at 894, the Supreme Court of Canada held that investigative powers pursuant to a provincial occupational safety statute were part of a regime that included the power to make remedial orders and thus constituted an interference with the administration of a federal undertaking.

19 *Starr v. Houlden*, *supra*, note 1, at 1389, quoting Hogg, *supra*, note 10, at 323.

20 *Starr v. Houlden*, *supra*, note 1, at 1391.

21 *Ibid.*, at 1390-91.

provincial tribunals might inquire into matters that are alleged to constitute professional misconduct for the purpose of regulating professions, and frequently such matters are also the subject of criminal proceedings. It is not unusual for the statutes governing professions to provide that the individual must co-operate in any investigation, must provide explanations, and, in some instances, can be compelled to testify at the hearing. Thus, the person under investigation is not necessarily accorded the same procedural protections as would be available in a criminal proceeding. The person is protected against the effects of self-incrimination by provisions of the Evidence Acts,[22] and of the Charter,[23] which will be discussed in the next section.

To the extent that the constitutional validity of such discipline proceedings has been adjudicated, the proceedings have been upheld as a valid exercise of provincial jurisdiction, despite their incidental overlap with criminal law, and despite their incidental effect on concurrent criminal proceedings. Although the validity of provincial public inquiries is analogous to the validity of these other types of provircial proceedings, the case law concerning public inquiries treats their validity as a discrete issue. It should be noted, however, that the court's approach to inquiries could have an impact on other types of investigations under provincial jurisdiction.

(c) FEDERAL LIMITS ON PROVINCIAL JURISDICTION TO ESTABLISH PUBLIC INQUIRIES

(i) Federal Jurisdiction over Criminal Law and Procedure

a. Introduction

The cases dealing with the constitutional validity of a provincial inquiry assess whether the inquiry serves valid provincial purposes, or is aimed, in substance, at the prosecution and punishment of criminal activity. A subset of the cases deals with the scope of provincial jurisdiction over the administration of justice and the extent to which it will support inquiries into criminal activity or police wrongdoing. The concern is not only with the subject matter or purpose of the inquiry, but with its effect. A witness compelled to testify before a provincial inquiry may be deprived of procedural protections that would be available if the witness were being prosecuted for a criminal offence arising out of the alleged wrongdoing. Public inquiries use inquisitorial procedures which

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22 See *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5, and *Evidence Act*, R.S.O. 1990, c. E.23, s. 9.

23 *Supra*, note 4.

would not be allowed in criminal proceedings. Chief Justice Laskin, who construed narrowly the provincial jurisdiction over the administration of justice,[24] nonetheless acknowledged that the provinces are entitled to establish commissions of inquiry with coercive powers to investigate matters properly grounded within their jurisdiction, giving as examples the provincial inquiries into violence or illegal activity in the construction industry.[25] Further, he noted that such inquiries could be authorized "to punish for contempt recalcitrant witnesses or persons properly subpoenaed who refuse to be sworn",[26] thus departing from criminal law procedure. In his view, if the subject matter of an inquiry were properly within provincial jurisdiction, procedures that could not be utilized as a matter of criminal procedure would nonetheless be valid.

In any event, since the Charter now limits the jurisdiction of both levels of government to interfere with procedural protections of persons accused of offences[27] and, to an extent not yet determined, persons suspected of offences,[28] concern about interference with procedural rights may be removed from "division of powers" analysis.

However compelling this logic may be, *Starr v. Houlden*[29] indicates that concern with procedures may still influence "division of powers" analysis. It is useful to examine the cases with a view to understanding the extent to which provincial jurisdiction to establish inquiries is limited by the operation of federal jurisdiction over criminal law and procedure, and the extent to which those limits may have been influenced by a concern to protect individual rights.

b. The Development of the Case Law

(1) The Early Cases: A Liberal Approach to Provincial Jurisdiction

Early cases indicated a liberal interpretation of provincial jurisdiction to establish inquiries that overlapped with criminal law and procedure. Thus, in

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24 See the dissenting reasons of Laskin C.J.C. in *Di Iorio v. The Warden of the Common Jail of Montreal*, [1978] 1 S.C.R. 152, at 158, (1976), 73 D.L.R. (3d) 491, at 495 (subsequent references are to 73 D.L.R. (3d)). See, also, his majority reasons in *The Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16 (subsequent references are to 3 D.L.R. (4th)).

25 *Di Iorio v. The Warden of the Common Jail of Montreal*, *supra*, note 24, at 499.

26 *Ibid.*, at 496.

27 *Charter*, *supra*, note 4, s. 11.

28 *Ibid.*, s. 7.

29 *Supra*, note 1.

1873, the Privy Council indicated that it was within provincial competence to establish a fire marshal's inquiry, with powers to compel testimony, in a case of suspected arson.[30] Further, in 1919, the British Columbia Court of Appeal upheld a provincial inquiry into the importation of liquor prohibited by federal law, on the basis that the provincial jurisdiction over the administration of justice included "the ferreting out of crime and identification of criminals. There is nothing novel in compelling a witness to give evidence which may tend to incriminate him."[31]

(2) *The Validity of and Limits on Coroners Inquests*

The scope of provincial jurisdiction to establish inquiries was first considered by the Supreme Court of Canada in 1966 in *Batary v. The Attorney General for Saskatchewan*,[32] in which a majority of the court held that legislation compelling a person charged with murder to testify at a coroner's inquest into the death was legislation in relation to criminal law and thus *ultra vires* the province. Cartwright J., for the majority, commented as follows:[33]

> It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a Coroner and submit him against his will to examination and cross-examination as to his supposed guilt.

Fauteux J., dissenting, considered the impugned provision to be consistent with federal law. In his view, since a witness at an inquest is not charged with an offence, the witness is compellable in those proceedings, notwithstanding her status in other criminal proceedings. Moreover, the witness is protected by the *Canada Evidence Act*[34] against use of the testimony to incriminate the witness in subsequent criminal proceedings.

Neither Cartwright J. nor Fauteux J. discussed whether the legislation establishing the coroner's inquest was properly within provincial jurisdiction. The majority seems to have proceeded on the basis that, even if the inquest were otherwise valid, it could not be used to compel an accused to testify. Fauteux J. appears to have considered that the inquiry served a proper provincial purpose and that any incidental impact on the witness's rights as an accused was adequately

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30 *R. v. Coote* (1873), L.R. 4 P.C. 599, at 605, 17 E.R. 587, at 590-91.

31 *Re Public Inquiries Act* (1919), 48 D.L.R. 237, at 240 (C.A.).

32 [1965] S.C.R. 465, 52 D.L.R. (2d) 125 (subsequent references are to 52 D.L.R. (2d)).

33 *Ibid.*, at 134.

34 R.S.C. 1952, c. 307.

addressed by the statutory protection against the use of the testimony in subsequent proceedings.

In *R. v. McDonald; Ex parte Whitelaw*,[35] the British Columbia Court of Appeal declined to apply the rule laid down in *Batary v. The Attorney General for Saskatchewan*,[36] to a person who had not yet been charged but was suspected of being responsible for the death under investigation by the coroner. The Supreme Court of Canada dismissed an application for leave to appeal and, in a subsequent case, a majority of the court approved and adopted the decision of the British Columbia Court of Appeal.[37]

In *Faber v. The Queen*,[38] the Supreme Court of Canada considered whether coroners' proceedings are civil or criminal, not for constitutional purposes, but in order to determine the proper court for judicial review of a coroner's order holding in contempt a witness who refused to testify. A majority of the Supreme Court of Canada held that a coroner's investigation is a civil proceeding to determine the circumstances of a death in order to educate and reassure the community.[39] Although the majority acknowledged that a coroner's inquest also serves to investigate crime, it held that such investigation is not its predominant aspect.[40] Before the coroner there is "no *lis*, no accused and no charge".[41] Accordingly, the majority held that an inquest is not a proceeding in a criminal matter. The fact that the witness had not been charged with any offence arising out of the death was held to be a "fundamental difference", the effect of which "is that *Batary* has no application to the case at bar".[42]

The minority considered a coroner's inquest to be a proceeding in a criminal matter, whether or not a charge had been laid in relation to the death being investigated. Pigeon J. stated that "[i]n my view, the decision in *Batary*, although rendered in a case where the suspected person was actually charged before the inquest, is equally applicable where a person is likely to be charged".[43]

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35 (1969), 2 D.L.R. (3d) 298, 66 W.W.R. 522 (B.C.C.A.), leave to appeal to S.C.C. refused November 3, 1969 (subsequent references are to 2 D.L.R. (3d)).

36 *Supra*, note 32.

37 *Faber v. The Queen*, [1976] 2 S.C.R. 9, (1975), 65 D.L.R. (3d) 423 (subsequent references are to 65 D.L.R. (3d)).

38 *Ibid.*

39 *Ibid.*, at 440.

40 *Ibid.*, at 441.

41 *Ibid.*, quoting *R. v. McDonald; Ex parte Whitelaw*, *supra*, note 35, at 308.

42 *Faber v. The Queen*, *supra*, note 37, at 434.

43 *Ibid.*, at 430.

As Pigeon J. subsequently pointed out in *Di Iorio v. The Warden of the Common Jail of Montreal*,[44] the determination in *Faber v. The Queen* that inquests are civil proceedings serving civil, not criminal purposes, was reached "in a case where, after an open verdict of death *due to a crime* by a person or persons unknown, the coroner resumed the inquest for the sole purpose of ascertaining who might be charged with such crime".[45]

In effect, the majority in *Faber v. The Queen*[46] held that coroners' inquests are civil proceedings that serve valid provincial purposes, and their incidental impact on the rights of witnesses who may be suspects in related criminal proceedings does not affect their validity. Thus, the majority "accept[ed] the conclusion of the British Columbia Court of Appeal in *R. v. McDonald, Ex p. Whitelaw*",[47] that a suspect is a compellable witness at a coroner's inquest, which is not a criminal proceeding.

Relying on the majority decisions in *Faber v. The Queen*[48] and *Batary v. The Attorney General for Saskatchewan*,[49] the Alberta Supreme Court, Appellate Division held, in *Re Morris-Jones and The Queen*,[50] that provincial legislation may validly compel a suspect, but not an accused, to testify at a coroner's inquest. The court considered the Supreme Court of Canada's decisions to be "determinative" of the issue.[51]

Counsel had argued that a suspect, as well as an accused, is entitled to protection from self-incrimination, and McGillivray C.J.A. considered this argument to have "at first blush, some appeal". Nonetheless, on further reflection, he concluded that if any witness could decline to testify on the basis of being likely to be charged, then section 5(1) of the *Canada Evidence Act*,[52] which protects a witness from the use of testimony to incriminate the witness in a subsequent proceeding, "would [be] completely nullif[ied]".[53]

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44 *Supra*, note 24.

45 *Ibid.*, at 517 (emphasis in original).

46 *Supra*, note 37.

47 *Ibid.*, at 441.

48 *Ibid.*

49 *Supra*, note 32.

50 (1975), 67 D.L.R. (3d) 466, [1976] 2 W.W.R. 113 (Alta. S.C., App. Div.) (subsequent references are to 67 D.L.R. (3d)).

51 *Ibid.*, at 480.

52 R.S.C. 1970, c. E-10.

53 *Re Morris-Jones and The Queen*, *supra*, note 50, at 469.

These cases dealing with the validity of coroners' inquests incorporate into the federalism issue a partial "protection of rights" analysis. Although the legislation establishing coroners' inquests is considered valid as serving provincial purposes, it is, in effect, held to be inoperative insofar as it affects the non-compellability in criminal proceedings of a person accused of an offence. The inquiry's incidental impact on an accused was thus considered sufficiently significant that it altered the validity of the inquiry as it affected him. The fact that the accused could not be compelled to testify in criminal proceedings acted as a shield against compellability in provincial proceedings. The protections provided under section 5(2) of the *Canada Evidence Act*[54] against subsequent use of the compelled testimony in criminal proceedings did not save the provincial inquiry.

The fragility of the "protection of rights" analysis is underscored by the fact that the court was not prepared to extend it to protect suspects, even though a suspect in a criminal matter may have a corresponding right to remain silent, as will be discussed in the next section, and even though it appears that this right may constitute part of the federal criminal law.[55] If a suspect who testifies at an inquest, or a co-accused who testifies in a separate proceeding against the other accused, is protected only to the extent provided in section 5(2) of the *Canada Evidence Act*, there would appear to be no reason why an accused should be placed in a different position when testifying at an inquest held for proper provincial purposes.

The distinction might be justified, at least in terms of "division of powers" analysis, if federal jurisdiction in relation to criminal procedure were limited to the definition and prosecution of offences. However, as will be discussed below, it has been held that federal jurisdiction extends to the investigation of criminal offences. Accordingly, federal jurisdiction does not commence when an accused is charged; it also applies to the investigation of suspects.

Another approach could have been taken on the facts of *Faber v. The Queen*.[56] At the point in the inquiry when Faber objected to testifying, the sole issue under consideration, apparently, was the identity of the person who had caused the victim's death. Arguably, this issue was beyond the proper provincial purpose on the basis of which the inquiry was generally within provincial jurisdiction. It could have been argued that further questioning of witnesses,

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54 *Supra*, note 22.

55 See *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 2 D.L.R. (4th) 193 (subsequent references are to 2 D.L.R. (4th)), discussed *infra*, secs. 1(c)(i)b.(3) and 1(d)(iii), in which the common law privilege against compelling a police informer to testify was held to be part of the federal criminal law.

56 *Supra*, note 37.

whether suspects or accused, for the purpose of identifying the perpetrator of a crime, was *ultra vires*.

The effect, however, of *Batary v. The Attorney General for Saskatchewan*[57] and *Faber v. The Queen*[58] was to uphold the validity of coroners' inquests, to authorize coroners to compel suspects to answer questions even if they related solely to the detection of criminal activity, and to protect an accused from being examined at an inquest on any issue.

(3) The Administration of Justice: Provincial Inquiries into Organized Crime and Police Misconduct

The constitutional validity of a provincial inquiry that compelled testimony from witnesses who might be suspected of criminal offences was addressed by the Supreme Court of Canada in *Di Iorio v. The Warden of the Common Jail of Montreal*.[59] In that case, witnesses had refused to testify before a provincial inquiry into organized crime in the Province of Quebec, and had been held in contempt. They challenged the constitutional validity of the legislation establishing the inquiry. Seven members of the nine-member court upheld its validity, and thus upheld its authority to compel potential suspects to testify.

Pigeon J. dealt with the case on narrow grounds. He considered that the majority decision in *Faber v. The Queen*,[60] from which he had strongly dissented, had settled that a provincial inquiry did not intrude on the criminal law power even if it authorized the compulsory examination, on oath, of a person suspected of crime, and even if the sole purpose of the examination was to establish whether that person should be charged criminally. He stated that the judgment in *Batary v. The Attorney General for Saskatchewan*[61] "shows that once a charge is laid under the *Criminal Code* an accused may be said to be subject to criminal proceedings, but *Faber* and the other cases cited show that a person who is merely exposed to a charge is not in the same situation".[62]

Accordingly, he held that the inquiry into crime was not beyond provincial jurisdiction merely because it might result in a report that could lead to charges

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57 *Supra*, note 32.

58 *Supra*, note 37.

59 *Supra*, note 24.

60 *Supra*, note 37.

61 *Supra*, note 32.

62 *Di Iorio v. The Warden of the Common Jail of Montreal*, *supra*, note 24, at 518.

being laid against persons compelled to testify before the inquiry.[63] The majority opinion in *Di Iorio v. The Warden of the Common Jail of Montreal* focuses on the nature of the province's jurisdiction over the administration of justice, and whether it can support an inquiry into the incidence of criminal activity in the province. Dickson J., in the first of a series of judgments in which he argued for an expansive approach to provincial jurisdiction over the administration of justice,[64] concluded that the inquiry was a valid exercise of provincial jurisdiction and, accordingly, could compel witnesses to testify on penalty of contempt.[65] He held that "[t]he phrase 'administration of justice' is free standing and an independent source of provincial power", which includes criminal justice and is not limited to matters otherwise within provincial jurisdiction.[66] Noting the overlap between provincial jurisdiction over the administration of justice and federal jurisdiction over criminal law and procedure, he relied on history,[67] practice,[68] and statutory construction,[69] to determine that the provincial power is to be given "a fair, large and liberal construction", reserving only substantive criminal law and criminal procedure to Parliament.[70] He concluded as follows:[71]

> The Inquiry does not act as a criminal Court or exercise criminal jurisdiction. The conduct of the Inquiry is not part of a criminal prosecution under the *Criminal Code* nor is it an investigation into a particular crime or transaction which later might be the subject of a criminal charge. We are not here concerned with a criminal trial, structured as a dispute between two sides, the Crown and the accused. The function of the Inquiry is merely to investigate and report; no person is accused; those who appear do so as witnesses; there is no *lis*; there is no attempt to alter criminal procedure. The proceedings of the

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63 *Ibid.* Pigeon J. also stated, at 518, as follows:

> If it must be said that such an inquiry prior to any charge being laid under the *Criminal Code* comes within the description of 'Administration of Justice in the Province', not of 'procedure in a criminal matter', I cannot appreciate how one may take a different view where the object of the inquiry, instead of being a gathering of information sufficient to lay a charge for criminally causing the death of a person, is the gathering of information identifying persons engaged in organized crime and describing their activities.

64 See, also, *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193; *The Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267, 123 D.L.R. (3d) 257 (subsequent references are to 123 D.L.R. (3d)); *The Attorney General of Canada v. Canadian National Transportation Ltd.*, *supra*, note 24; *R. v. Wetmore*, [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577; and *O'Hara v. British Columbia*, *supra*, note 17.

65 *Di Iorio v. The Warden of the Common Jail of Montreal*, *supra*, note 24, at 522.

66 *Ibid.*, at 531.

67 *Ibid.*, at 525-27.

68 *Ibid.*, at 527-29.

69 *Ibid.*, at 527.

70 *Ibid.*, at 523.

71 *Ibid.*, at 524-25.

> commission are not criminal proceedings in the sense that punishment is their aim. The legislation under attack establishes an inquiry into the nature and prevalence of certain types of illegal conduct within the Province of Quebec but does not seek to create new crimes or to alter old ones.

Dickson J. distinguished "criminal procedure" from an inquiry into the scope of criminal activity:[72]

> Accepting that police investigation of an individual must comply with federal standards of criminal procedure, it is not immediately apparent why an investigative overview of crime on a collective basis should be open to constitutional attack.

He considered his conclusions to be consistent with *Faber v. The Queen*,[73] commenting that:[74]

> One might seek to distinguish *Faber* with the argument that the multi-purpose nature of the coroners' inquest has no counterpart in the Crime Inquiry where the sole concern is to identify the scope and operation of organized crime. Arguably that is a federal matter either because a Province cannot inquire into a subject of federal jurisdiction (criminal law) or because it is a colourable attempt to legislate regarding criminal procedure but in my opinion neither of these grounds is tenable.

Dickson J. rejected the argument that the inquiry's powers to compel testimony interfered with a right to protection against self-incrimination. In his view, that right was limited to protecting the witness against use of the testimony to incriminate the witness in a subsequent proceeding.[75]

In separate reasons, Beetz J. agreed "in substance" with both Pigeon J. and Dickson J. He also examined the historical record, concluding that the phrase "administration of justice" was intended to be broad, and that the power given to the federal Parliament to legislate in relation to criminal law and procedure is " 'the power to determine what shall or what shall not be "criminal", and to determine the steps to be taken in prosecutions and other criminal proceedings before the Courts' ".[76] He acknowledged that, given the ancillary powers of the Parliament of Canada and the interrelated aspects of criminal justice, Parliament might have some overlapping jurisdiction in the field of criminal

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72 *Ibid.*, at 531.

73 *Supra*, note 37.

74 *Di Iorio v. The Warden of the Common Jail of Montreal*, *supra*, note 24, at 536.

75 *Ibid.*, at 537-39.

76 *Ibid.*, at 541, quoting Taschereau J. in *Attorney General of Quebec v. Attorney General of Canada*, [1945] S.C.R. 600, at 603, [1945] 4 D.L.R. 305, at 328.

investigation,[77] but he found no federal provisions that were in conflict with, and thereby rendered inoperative, the provincial inquiry.[78]

In dissenting reasons, Laskin C.J.C., presented a narrow approach to provincial jurisdiction over the administration of justice. In his view, the federal power over criminal procedure included the power to investigate crimes, actual and potential, and to investigate the administration of criminal justice.[79] Laskin C.J.C. indicated that provincial inquiries that incidentally touch on criminal law and the administration of criminal justice may be upheld only if they are anchored in "substantive provincial legislative authority". In his view, however, provincial jurisdiction over the administration of justice did not include the administration of justice in criminal or other matters within federal jurisdiction, which would have the effect of enabling a province to hold an inquiry into "fields where exclusive legislative power rests with the Parliament of Canada".[80]

Thus, Laskin C.J.C. concluded that the federal jurisdiction encompassed both criminal law and procedure in particular offences and the investigation of criminal activity in the province, its nature, prevalence, and impact, and the effectiveness of law enforcement methods against it:[81]

> What is presented here under s. 19 of the *Police Act* is a provincial adoption of a new form of procedure for inquiring into crime, a procedure in a criminal matter, within s. 91(27), and although there is no direct attempt under s. 19 and under the implementing Order in Council to change the existing criminal law, a different method of examining its operation is prescribed from the method laid out in the *Criminal Code* and in allied federal legislation.

He concluded that the inquiry under consideration constituted an "inquisitorial process, more draconian than what Parliament has prescribed in relation to the investigation, detection and prosecution of crime" and that the process was thus "a direct invasion of exclusive federal competence".[82] His main concern was that the subject matter of the inquiry was within federal jurisdiction, but these comments also suggest a concern with rights protection.

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77 *Di Iorio v. The Warden of the Common Jail of Montreal, supra*, note 24, at 542.

78 *Ibid.*, at 543.

79 *Ibid.*, at 509. Laskin C.J.C. also concluded, at 507, that the authority of provincial police to investigate crimes derives from federal legislation or pre-Confederation legislation and is thus within federal jurisdiction.

80 *Ibid.*, at 497.

81 *Ibid.*, at 509-10.

82 *Ibid.*, at 508.

As discussed below, although the then Chief Justice's approach to the substantive scope of provincial jurisdiction over the administration of justice was rejected by the majority in *Di Iorio*, it prevailed in another context eight years later when the court, differently constituted, addressed the issue of jurisdiction over the prosecution of criminal and other federal offences,[83] a matter that is central to the administration of criminal justice.

Two years after its decision in *Di Iorio v. The Warden of the Common Jail of Montreal*,[84] the Supreme Court of Canada again considered the constitutional validity of a Quebec provincial inquiry, this time into illegal acts alleged to have been committed by various police forces in the province, including the Royal Canadian Mounted Police (the "R.C.M.P."). The inquiry was mandated to investigate specific allegations of wrongdoing and "to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future".[85] In *Attorney General of Quebec v. The Attorney General of Canada*,[86] the Supreme Court of Canada held that the province had jurisdiction to establish the inquiry, but imposed two limits on its authority. First, it precluded the commission from compelling testimony from a federal minister; second, it precluded the commission from inquiring into the internal regulation and practices, that is, the internal management, of the R.C.M.P. These exclusions are discussed below.[87]

With respect to the validity of the inquiry itself, a majority of the court, speaking through Pigeon J., held *Di Iorio* and *Faber* to be determinative. Pigeon J. felt obliged by *stare decisis* to uphold the validity of the inquiry:[88]

> I can see no basis for a distinction between such an inquiry [into specific criminal activities] and an inquiry into "organized crime" as in *Di Iorio*, or a coroner's inquiry into a criminal homicide as in *Faber v. The Queen*.... Notwithstanding all the arguments submitted by counsel for the Solicitor-General of Canada, I find myself bound by authority to hold that such inquiries come within the scope of "The Administration of Justice in the Province".

Pratte J. indicated in brief separate reasons that he concurred with Pigeon J. because he too considered himself bound by the decision of the court in *Faber*.

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83 See the discussion of *The Attorney General of Canada v. Canadian National Transportation Ltd.*, *supra*, note 24, *infra*, this ch., sec. 1(c)(i)b.(4).

84 *Supra*, note 24.

85 Mandate of Keable inquiry, reproduced in *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 168.

86 *Ibid.*

87 See *infra*, sec. 1(c)(ii).

88 *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 179.

Otherwise, he would have held that "the Commission's mandate was in excess of provincial powers to the extent that it provides for a coercive inquiry which is essentially aimed at investigating specific crimes and searching for their authors".[89]

As noted above,[90] Estey J. agreed with the result, but gave separate reasons in order to offset "the tendency which may develop to construe" precedents in an arbitrary manner in "related but not necessarily parallel circumstances".[91] He sought to clarify the demarcation between a valid provincial inquiry into the administration of justice and an inquiry that invades federal jurisdiction over criminal law and procedure.[92] His comments, which have been quoted and endorsed subsequently by a majority of the court,[93] indicate that the characterization of a provincial inquiry is a matter of weighing the extent to which an inquiry serves valid provincial interests in the effectiveness of policing and law enforcement against the extent to which it amounts to an investigation of a specific crime for the purposes of criminal prosecution:[94]

> The Province, in the discharge of its role under s. 92(14) of the *British North America Act, 1867* may be required, or may find it convenient, to examine by the usual executive agencies or by a commission of inquiry, the operation of its policing facilities and personnel, and the prevalence of crime and its nature in the Province. Such was the case before the Court in *Di Iorio*.... At the other end of the scale, the enforcement agencies of the Province may of course investigate allegations or suspicions of specific crime with a view to the enforcement of the criminal law by prosecution. This investigation must be in accordance with federally prescribed criminal procedure and not otherwise, as for example, by coercive inquiry under general inquiry legislation of the Province.
>
> In the middle of the scale is the situation facing the Court in this proceeding. The Province has set out to investigate the operations of provincial and municipal police apparatus in relation to certain specific events which have obvious criminal connotations. Each such enterprise when undertaken by a Province must be examined in its own particular circumstances. Where the object is in substance a circumvention of the prescribed criminal procedure by the use of the inquiry technique with all the aforementioned serious consequences to the individuals affected, the provincial action will be invalid as

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89 *Ibid.*, at 194.

90 *Supra*, text accompanying note 13.

91 *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 194.

92 *Ibid.*, at 192.

93 See *Starr v. Houlden*, *supra*, note 1, at 1395-96.

94 *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 192-93.

> being in violation of either the criminal procedure validly enacted by authority of s. 91(27), or the substantive criminal law, or both. Where, as I believe the case to be here, the substance of the provincial action is predominantly and essentially an inquiry into some aspects of the criminal law and the operations of provincial and municipal police forces in the Province, and not a mere prelude to prosecution by the Province of specific criminal activities, the provincial action is authorized under s. 92(14).

In effect, Estey J. applied the aspect doctrine to those cases in which a provincial inquiry investigated "the operations of provincial and municipal police apparatus in relation to certain specific events which have obvious criminal connotations". If the provincial inquiry is properly grounded in a head of provincial jurisdiction, it may incidentally compel a person suspected of a criminal act to testify, but it may not compel testimony where the purpose of the inquiry is to gather evidence for criminal prosecutions.

In *The Attorney General of Alberta v. Putnam*,[95] the Supreme Court faced a refinement of the issues that had arisen in *Attorney General of Quebec v. The Attorney General of Canada*.[96] A majority of the court, speaking through Laskin C.J.C., held that the province has no authority to discipline or inquire into the conduct of an R.C.M.P. officer providing municipal policing services under a contract between the province and the R.C.M.P. The majority considered such an inquiry to be an interference with the administration and management of the R.C.M.P.

Dickson J., dissenting, held that the discipline of police officers engaged in law enforcement in the province is within provincial jurisdiction over the administration of justice, and would only incidentally affect the management of the R.C.M.P. In his view the inquiry into police misconduct for the purpose of imposing discipline was within provincial jurisdiction.

The inquiry in *The Attorney General of Alberta v. Putnam*,[97] differs from that in *Attorney General of Quebec v. The Attorney General of Canada*[98] in that it concerned a single instance of alleged misconduct, and was authorized pursuant to general police legislation. The province did not seek to examine systemic problems of law enforcement on a broader scale for the purpose of making recommendations, as had been the case in *Attorney General of Quebec v. The Attorney General of Canada*; rather, it sought to regulate the conduct of a police officer providing municipal policing services pursuant to legislation of general

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95 *Supra*, note 64.

96 *Supra*, note 5.

97 *Supra*, note 64.

98 *Supra*, note 5.

application to police officers. Several years later, in his majority judgment in *O'Hara v. British Columbia*,[99] Dickson C.J.C. stated that in *The Attorney General of Alberta v. Putnam*, "the concern was not so much the potential of provincial usurpation of criminal evidence and procedure, but rather provincial interference in federal organizations".[100] In *O'Hara v. British Columbia*,[101] the majority confirmed the statement Dickson J. had made in *The Attorney General of Alberta v. Putnam*,[102] that "[i]t has never been doubted" that provincial jurisdiction over the administration of justice includes "responsibility for providing general policing services" and authority to "appoint, control and discipline municipal and provincial police officers". It thus appears that *The Attorney General of Alberta v. Putnam* is construed only as limiting a provincial inquiry from interfering in the management of a federal undertaking, in that case the management of the R.C.M.P.

In *Bisaillon v. Keable*,[103] the Supreme Court of Canada, in a unanimous judgment, upheld the validity of an inquiry into allegedly illegal acts committed by police forces, including the recruitment of informers by illegal or reprehensible acts. The court confirmed that the powers, duties, and capacities of peace officers are a matter of criminal law within federal jurisdiction, but that the manner in which such powers are exercised, including the discipline of provincial police forces and their members, comes within provincial jurisdiction over the administration of justice.[104]

In combination, *Attorney General of Quebec v. The Attorney General of Canada*,[105] *The Attorney General of Alberta v. Putnam*,[106] *Bisaillon v. Keable*,[107] and the later case, *O'Hara v. British Columbia*,[108] appear to authorize two types of provincial inquiries related to police conduct. First, a provincial inquiry may investigate systemic problems of law enforcement for the purpose of making recommendations to remedy the problems, and in the course of such an inquiry may investigate specific allegations of wrongdoing, but may not investigate the internal management of a federal police force. Second, a province may authorize an inquiry into specific allegations of wrongful activity for the

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99 *Supra*, note 17.

100 *Ibid.*, at 538.

101 *Ibid.*

102 *Supra*, note 64, at 266.

103 *Supra*, note 55.

104 *Ibid.*, at 208.

105 *Supra*, note 5.

106 *Supra*, note 64.

107 *Supra*, note 55.

108 *Supra*, note 17.

purpose of regulating police conduct, unless (a) the police officer involved is a member of a federal force and (b) the inquiry has authority to discipline the officer for any improper conduct.

(4) The Administration of Justice, Prosecutorial Authority, and Limits on Provincial Inquiries

In *The Attorney General of Canada v. Canadian National Transportation Ltd.*,[109] the court, by a simple majority, restricted the scope of the administration of justice, holding that authority to prosecute criminal offences resides with the federal Parliament pursuant to its jurisdiction over criminal law and procedure.[110] Laskin C.J.C., for the majority, relied on the "language and logic" of section 91(27)of the *Constitution Act, 1867*,[111] in conjunction with section 92(14), on the legislative arrangements for prosecution of crime following Confederation, and on precedents and authorities, historical and contemporary.

In the course of his reasons, Laskin C.J.C. referred to the limits on provincial jurisdiction to establish public inquiries, expressly endorsing[112] and adopting[113] statements made by Martin J.A. of the Ontario Court of Appeal in the case of *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2)*.[114] Parliament had provided for the compulsory examination on oath of suspects for the purpose of determining whether a combines offence had been committed. Martin J.A. had noted that such an inquiry could not have been established within provincial jurisdiction:[115]

> Notwithstanding the overlapping between s. 91(27) and s. 92(14), manifestly it would not be within provincial competence to enact legislation enabling a police officer to summon a suspect before an official and submit the suspect to compulsory examination under oath with respect to his involvement in a crime. Even though such legislation might be described as legislation in relation to the investigation of offences and thus appear to fall within the category of the administration of justice, such legislation in pith and substance

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109 *Supra*, note 24.

110 *Ibid.*, at 37.

111 *Supra*, note 3.

112 *The Attorney General of Canada v. Canadian National Transportation Ltd.*, *supra*, note 24, at 42.

113 *Ibid.*, at 45.

114 (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (subsequent references are to 125 D.L.R. (3d)).

115 *Ibid.*, at 638 (emphasis in original), quoted in *The Attorney General of Canada v. Canadian National Transportation Ltd.*, *supra*, note 24, at 43.

would be legislation in relation to criminal procedure and thus within the *exclusive* competence of Parliament.

Martin J.A. distinguished investigations into "specific transactions in relation to specified offences" from investigations into "general conditions in a Province with respect to the existence of combines or predatory pricing practice or the conditions favourable to their formation or operation".[116] The implication is that the former is beyond the jurisdiction of the province while the latter is not.

The majority in *The Attorney General of Canada v. Canadian National Transportation Ltd.*,[117] endorsed this position. It did not, however, express any doubt about its previous decision in *Attorney General of Quebec v. The Attorney General of Canada*,[118] that a province may establish an inquiry involving investigation of specific allegations of police misconduct. Moreover, on the same day the court released its decision in *Bisaillon v. Keable*,[119] which assumes the validity of the court's decision in the earlier case arising out of the Keable inquiry. Accordingly, it does not appear that the majority intended to cast doubt on *Attorney General of Quebec v. The Attorney General of Canada*. This view of the effect of *The Attorney General of Canada v. Canadian National Transportation Ltd.*, was adopted by the trial judge in the later case of *O'Hara v. British Columbia*,[120] and his comments were quoted in that case by the majority in the Supreme Court of Canada.[121] Accordingly, it appears that the combined effect of *The Attorney General of Canada v. Canadian National Transportation Ltd.* and the Keable cases[122] is (a) that a province does not have jurisdiction to establish an inquiry for the purpose of investigating the commission of offences pursuant to the federal law, but (b) that an inquiry established for provincial purposes may investigate specific allegations of wrongdoing.

As a result of *The Attorney General of Canada v. Canadian National Transportation Ltd.*,[123] it appears that Parliament has jurisdiction over the investigation and prosecution of the criminal law, and that provincial jurisdiction over the administration of criminal justice is limited, on the one hand, to broad

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116 *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2), supra*, note 114, at 639.

117 *Supra*, note 24.

118 *Supra*, note 5.

119 *Supra*, note 55.

120 *Supra*, note 17.

121 *Ibid.*, at 535.

122 *Attorney General of Quebec v. The Attorney General of Canada, supra*, note 5, and *Bisaillon v. Keable, supra*, note 55.

123 *Supra*, note 24.

inquiries into the incidence of crime and, on the other hand, into regulation of the management and conduct of the provincial police forces.

(5) Avoiding Legal Conclusions: A New Emphasis in Re Nelles and Grange

In light of the narrow statutory approach to the protection against self-incrimination as discussed by Dickson J. in *Di Iorio v. The Warden of the Common Jail of Montreal*,[124] there had been little comment in the subsequent cases on the impact of provincial inquiries on the "procedural rights" of witnesses. The issue arose again, however, in *Re Nelles and Grange*,[125] a decision of the Ontario Court of Appeal. Although that case was not appealed further, it has been cited with approval by the Supreme Court of Canada.

After a series of suspicious deaths at the Hospital for Sick Children in Toronto, an unsuccessful criminal charge against one of the nurses, and an inconclusive investigation, the Province of Ontario established a public inquiry to investigate and report on the circumstances surrounding the deaths and the unsuccessful criminal proceedings. In a statement to the Legislature, the Attorney General "gave the assurance that if evidence ever became available to warrant the laying of additional charges, such charges would be laid and vigorously prosecuted".[126] Nonetheless, the terms of reference of the inquiry precluded the commissioner from "expressing any conclusion of law regarding civil or criminal responsibility" in order to protect the interests of potential litigants.[127] The commissioner stated a case to the court as to whether he could "express [his] opinion upon whether the death of any child was a result of the action, accidental or otherwise, of any named person or persons".[128]

The Court of Appeal held that the commissioner was not entitled to name any individual as having caused, accidentally or otherwise, any of the deaths. The conclusion was based on the limitation in the terms of reference, but the court went further to express the view that, without the limitation, the constitutional validity of the inquiry would have been "vulnerable".[129] In a statement that the

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124 *Supra*, note 24.

125 *Supra*, note 17.

126 *Ibid.*, at 215.

127 *Ibid.*, at 214.

128 *Ibid.*, at 212.

129 *Ibid.*, at 217.

majority of the Supreme Court of Canada subsequently quoted as an "important observation",[130] the Court of Appeal commented as follows:[131]

> A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes.... Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility.

No question was raised as to whether the inquiry served a proper provincial purpose that would enable it to affect incidentally the criminal law power as it might otherwise apply to some witnesses. Nor was any question raised about the compellability of potential suspects for purposes of the inquiry. The court assumed that the inquiry was valid and the suspects compellable, provided no findings were made with respect to their responsibility, either civil or criminal.

In effect, this approach places a limit on the principle adopted in *Attorney General of Quebec v. The Attorney General of Canada*.[132] Although an inquiry for provincial purposes may investigate specific allegations of wrongdoing, it must make no findings of civil or criminal responsibility. It thus appears that the investigation of acts of wrongdoing could be only for the purpose of understanding the nature and scope of the problem under investigation and for the purpose of identifying possible solutions to the problem.

(6) Police Misconduct Revisited

The Supreme Court of Canada did not immediately embrace the spirit of the decision in *Re Nelles and Grange*.[133] In *O'Hara v. British Columbia*,[134] the court upheld the validity of a provincial inquiry into an incident of alleged police misconduct resulting in the injury of a prisoner held in police cells. Earlier investigations, including an inquiry under the *Police Act*,[135] had led to the conclusion that the prisoner had been assaulted by two or more police officers and that some or all of the officers on duty that night had suppressed information concerning the incident. The inquiry, by its terms of reference, was required to investigate the incident, the identity of the persons responsible for the injuries, and whether evidence had been suppressed.

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130 *Starr v. Houlden*, *supra*, note 1, at 1398.

131 *Re Nelles and Grange*, *supra*, note 17, at 215-16.

132 *Supra*, note 5.

133 *Supra*, note 17.

134 *Supra*, note 17.

135 R.S.B.C. 1979, c. 331.

Chief Justice Dickson, for the majority, held that the province has jurisdiction, pursuant to section 92(14) of the *Constitution Act, 1867*,[136] over the organization and management of police forces created by provincial legislation, and the manner in which they exercise their powers.[137] He held that a province can establish an inquiry to investigate and report on alleged wrongdoings committed by members of a police force and empower the inquiry to conduct compulsory examinations of witnesses.[138] He held that such an inquiry into specific incidents is valid in itself, and need not be part of a broader mandate to investigate police practices and management. He cited the view of Pigeon J., who had found no distinction between an inquiry into police wrongdoing, an inquiry into organized crime, and a coroner's inquiry into a homicide.[139] Furthermore, he noted that the province's authority to establish the inquiry was enhanced in this instance by its jurisdiction in relation to matters of a local or private nature, and in relation to the management of provincial prisons.[140]

Chief Justice Dickson identified four limits on provincial jurisdiction to establish inquiries:

(i) a provincial inquiry is invalid to the extent that it intrudes into the management of a federal organization,[141] a proposition established in *Attorney General of Quebec v. The Attorney General of Canada*[142] and *The Attorney General of Alberta v. Putnam*;[143]

(ii) a provincial inquiry is invalid to the extent that it compels a person charged with an offence to testify regarding the circumstances giving rise to that charge,[144] a proposition established in *Batary v. The Attorney General for Saskatchewan*,[145] but open to doubt as incompatible with the aspect doctrine;[146]

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136 *Supra*, note 3.

137 *O'Hara v. British Columbia*, *supra*, note 17, at 539.

138 *Ibid.*, at 537.

139 *Ibid.*, at 541.

140 *Ibid.*, at 542. See *Constitution Act, 1867*, *supra*, note 3, s. 92(16) and (6).

141 *O'Hara v. British Columbia*, *supra*, note 17, at 537-38.

142 *Supra*, note 5.

143 *Supra*, note 64.

144 *O'Hara v. British Columbia*, *supra*, note 17, at 539.

145 *Supra*, note 32.

146 See *supra*, this ch., sec. 1(b)(iii).

(iii) a provincial inquiry is invalid to the extent that it amounts to a means by which a police officer can summon a suspect before an official and submit that suspect to a compulsory examination under oath with respect to his involvement in a crime solely for the purpose of gathering sufficient evidence to lay criminal charges,[147] a proposition approved in *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2)*[148] and *The Attorney General of Canada v. Canadian National Transportation Ltd.*,[149] but without use of the word "solely"; and

(iv) in establishing inquiries, neither a province nor Parliament may impose procedures which infringe the rights guaranteed by the Charter.[150]

Chief Justice Dickson noted the aspect doctrine, stating that, because the provincial and federal powers overlap, "[a] matter may well fall within the legitimate concern of a provincial legislature as pertaining to the administration of justice, and may, for another purpose, fall within the scope of federal jurisdiction over criminal law and criminal procedure".[151]

He concluded as follows:[152]

> A province has a valid and legitimate constitutional interest in determining the nature, source and reasons for inappropriate and possibly criminal activities engaged in by members of police forces under its jurisdiction. At stake is the management of the means by which justice is administered in the province. That such activity may later form the basis of a criminal charge and thus engage federal interests in criminal law and criminal procedure, does not, in my view, undermine this basic principle.

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147 *O'Hara v. British Columbia, supra*, note 17, at 542.

148 *Supra*, note 114.

149 *Supra*, note 24.

150 *O'Hara v. British Columbia, supra*, note 17, at 542-43. Note that in *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Division)*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 (subsequent references are to 67 D.L.R. (4th)) (hereinafter referred to as *"Thomson Newspapers Ltd. v. Canada"*), provisions in federal legislation requiring a witness to give evidence on oath to determine whether a combines offence had been committed, were challenged, unsuccessfully, on the basis that they infringed a right to silence which, it was argued, was guaranteed by s. 7 of the Charter. For a discussion of the application of the Charter to inquiries, see *infra*, this ch., sec. 2.

151 *O'Hara v. British Columbia, supra*, note 17, at 541.

152 *Ibid.*, at 541-42.

Accordingly, the court held that as long as the inquiry serves a provincial purpose and is not related solely to criminal investigation, it is valid, notwithstanding that its purpose is to identify those who engaged in wrongful acts that constitute criminal offences.[153] This formulation appears to be at odds with the approach of the Ontario Court of Appeal in *Re Nelles and Grange*,[154] in which limits were placed on an inquiry that presumably was valid, to prevent it from identifying those responsible for the deaths being investigated. The fact that the province has jurisdiction over the conduct of police officers does not provide a basis for distinguishing the cases since the province also has jurisdiction over the maintenance of hospitals and the licensing and professional conduct of nurses.

Since a majority of the Supreme Court of Canada has approved both cases in *Starr v. Houlden*,[155] it must have considered them to be reconcilable. Perhaps *O'Hara v. British Columbia*[156] could be understood as adding a qualification to *Re Nelles and Grange*,[157] namely that a provincial inquiry may investigate acts of wrongdoing not only for the purpose of understanding the nature and scope of a problem and identifying solutions to it, but also for the purpose of regulating conduct that is within provincial jurisdiction. Since the conduct of police is subject to provincial regulation, the province would be entitled to inquire into specific allegations of misconduct even in the absence of a broad policy context for the inquiry.

Another aspect of *O'Hara v. British Columbia*,[158] however, cannot be reconciled with other decisions. The majority approach in that case appears to depart from the established method for characterizing the matter of legislation, which requires assessment of the predominant characteristics of the legislation, rather than application of a threshold test. In *O'Hara*, a provincial inquiry is valid

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153 The decisions of the Supreme Court of Canada in *Faber v. The Queen*, *supra*, note 37, and *O'Hara v. British Columbia*, *supra*, note 17, were applied in *Re First Investors Corp. Ltd.; Re Associated Investors of Canada Ltd.* (1988), 58 Alta. L.R. (2d) 38, [1988] 4 W.W.R. 22 (Q.B.), aff'd (1988) 59 Alta. L.R. (2d) 334, 52 D.L.R. (4th) 168 (C.A.), to uphold the appointment of an inspector pursuant to the Alberta *Business Corporations Act*, S.A. 1981, c. B-15. The appointment had been challenged, in part, on the basis that the inspection might reveal evidence of a company's involvement in crime. The court held, at 58, that, although the investigation is not a public inquiry, "the same division of powers principles apply", and that an inquiry constituted for a valid provincial purpose is not rendered *ultra vires* by the fact that it may reveal evidence of a person's involvement in crime.

154 *Supra*, note 17.

155 *Supra*, note 1.

156 *Supra*, note 17.

157 *Supra*, note 17.

158 *Supra*, note 17.

as long as it is established that it serves some provincial purpose and is thus not aimed solely at gathering evidence in support of a criminal charge. This approach would allow more scope to provincial inquiries than would an approach that assesses the predominant features or purposes of the inquiry. As will be noted below, the majority in *Starr v. Houlden*[159] implicitly rejected the test applied in *O'Hara v. British Columbia* and returned to the conventional test of pith and substance.

Mr. Justice Estey dissented in *O'Hara*, referring again to the scale or continuum between valid and invalid provincial inquiries.[160] In his view, the only object of the inquiry was "the continuation of the work of earlier inquiries into these events so as to isolate and identify the actual wrongdoers with a view to prosecution".[161] He could discern no broad institutional objectives for the inquiry that would support it as an inquiry into the management of provincial penitentiaries.[162]

The overriding consideration, in his view, was the impact on the "right of the accused to remain silent". He concluded that, "[b]ecause of the gravity of the potential consequences to the individual resulting from a provincial encroachment on the criminal process, the courts...should be very cautious in extending the criminal-related inquiries which the provinces may from time to time mount".[163]

The validity of a provincial inquiry into criminal justice matters arose again before the Supreme Court of Canada with respect to Nova Scotia's inquiry into the Donald Marshall Jr. prosecution. In a majority judgment, McLachlin J. stated as follows:[164]

> I am satisfied that the Province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall, Jr. These are matters pertaining to the administration of justice within the Province, and...they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country....

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159 *Supra*, note 1.

160 See *supra*, text accompanying note 14.

161 *O'Hara v. British Columbia*, *supra*, note 17, at 545.

162 *Ibid.*, at 546.

163 *Ibid.*, at 545.

164 *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at 835, 61 D.L.R. (4th) 688, at 724.

As in *O'Hara v. British Columbia*,[165] provincial jurisdiction over the administration of justice was interpreted broadly to allow provincial investigation of specific incidents of wrongdoing. Unlike that case, however, this inquiry was undertaken in a broader policy context of searching for methods to prevent miscarriages of justice similar to the wrongful conviction of Donald Marshall Jr.

(7) Starr v. Houlden: An Invasion of Federal Jurisdiction

The most recent decision of the Supreme Court of Canada on provincial jurisdiction to appoint public inquiries is *Starr v. Houlden*,[166] in which a majority of the court held that the inquiry amounted to a substitute police investigation and preliminary inquiry into matters that constituted a criminal offence, and thus the inquiry exceeded provincial jurisdiction.

The terms of reference required the commissioner to "locate and identify" dealings involving Patricia Starr and Tridel Corporation Inc. with elected and unelected public officials, and to inquire into and report whether benefits had been conferred on the officials. As in *Re Nelles and Grange*,[167] the commissioner was limited by the commission's terms of reference from "expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization".[168]

The majority held that the inquiry was, in pith and substance, an invasion of federal jurisdiction over criminal law, on three grounds. First, the inquiry was aimed at investigating named individuals in relation to specific criminal offences rather than being aimed at restoring public confidence in the integrity and institutions of government generally or reviewing the regime governing the conduct of public officials.[169]

Second, since the terms of reference were couched in the language of the analogous criminal offence, the comissioner's findings would inevitably constitute a *prima facie* case against the private persons named for investigation, and it was thus not sufficient that the terms of reference restricted the

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165 *Supra*, note 17.

166 *Supra*, note 1.

167 *Supra*, note 17.

168 *Starr v. Houlden*, *supra*, note 1, at 1419-20, quoting the Divisional Court (1989), 70 O.R. (2d) 408, at 418.

169 *Starr v. Houlden*, *supra*, note 1, at 1403-05.

commissioner from "expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization".[170]

Third, the inquiry process constituted a substitute police investigation and preliminary inquiry into the allegations against Patricia Starr and Tridel Corporation Inc., in which they could be compelled to testify, thus circumventing federally prescribed criminal procedure.

In announcing the establishment of the inquiry, the Premier had referred to the importance to the democratic system of "the public's trust and faith in the integrity of their public officials",[171] but the terms of reference of the inquiry did not authorize investigation of these broad concerns. The inquiry was authorized only to identify and investigate acts of wrongdoing by two named private persons in their dealings with public officials.

Although the majority in *Starr v. Houlden* included three judges from the majority in *O'Hara v. British Columbia*,[172] it took quite a different view of the effect of previous decisions. In his review of the jurisprudence, Lamer J. indicated that *Faber v. The Queen*[173] stands for the proposition that a coroner's inquest has a primary purpose other than investigation of crime. He rejected the suggestion made by Pigeon J., in *Di Iorio v. The Warden of the Common Jail of Montreal*,[174] that *Faber v. The Queen* upheld the right of a coroner to compel a suspect to testify solely for the purpose of detecting crime. In his view, the comment was *obiter* in *Di Iorio*, "a broader reading of *Faber* than is necessary", and was not supported by a majority of the court.[175] He noted that the majority in *Di Iorio*, speaking through Dickson J., had considered *Faber* to be " 'peripherally' helpful" since it dealt with the narrower issue of court jurisdiction for procedural purposes, not the constitutional validity of inquiries conducted by coroners.[176] He made no reference to the fact that in *O'Hara v. British Columbia*,[177] Dickson C.J.C. had relied on *Faber* as establishing "that a province may equip a coroner with coercive investigatory powers" and had stated that "[s]ubsequent decisions of this court have applied the *Faber* principle to uphold provincial inquiries into alleged police wrongdoing".[178]

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170 *Ibid.*, at 1419-20.

171 *Ibid.*, at 1376.

172 *Supra*, note 17.

173 *Supra*, note 37.

174 *Supra*, note 24.

175 *Starr v. Houlden*, *supra*, note 1, at 1392.

176 *Ibid.*, at 1393.

177 *Supra*, note 17.

178 *Ibid.*, at 538.

Lamer J. characterized the majority's decision in *Di Iorio* as focusing on the purposes and functions of the inquiry, which was investigating the incidence and operation of organized crime rather than specific criminal acts by specific individuals.[179]

He described the court's decision in *Attorney General of Quebec v. The Attorney General of Canada*,[180] as establishing that a provincial commission cannot investigate the administration of the R.C.M.P., and explained that even though the inquiry in that case was authorized to investigate specific allegations of illegal acts by unnamed members of the R.C.M.P., the investigation was for the purpose of making recommendations to ensure such acts would not be repeated.[181] He did not refer to the fact that in *O'Hara v. British Columbia*,[182] in which the inquiry was aimed at investigating only specific allegations of police wrongdoing, Dickson C.J.C. had expressly commented that the mandate of the Keable Commission to make policy recommendations did not constitute "a decisive distinguishing constitutional feature".[183]

Although Pigeon J., in *Attorney General of Quebec v. The Attorney General of Canada*, had seen no distinction between a coroner's inquiry into a homicide, a general inquiry into organized crime, and an inquiry into specific acts of wrongdoing by police, Lamer J. indicated that his words should "not be taken to mean that it is within provincial jurisdiction to directly investigate particular individuals in respect of their alleged commission of specific criminal offences".[184] Again, Lamer J. made no reference to the fact that Mr. Justice Pigeon's statement had been quoted with approval and applied by Dickson C.J.C. in *O'Hara*.[185]

Lamer J. then adopted passages from the separate concurring reasons of Estey J. in *Attorney General of Quebec v. The Attorney General of Canada*, which differentiate provincial investigations into the incidence of crime or the operation of provincial law enforcement agencies from the investigation of "a precisely defined event or series of events with a view to criminal

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179 *Starr v. Houlden*, *supra*, note 1, at 1393-95.

180 *Supra*, note 5.

181 *Starr v. Houlden*, *supra*, note 1, at 1394.

182 *Supra*, note 17.

183 *Ibid.*, at 540.

184 *Starr v. Houlden*, *supra*, note 1, at 1395.

185 *Supra*, note 17, at 541.

prosecution".[186] Lamer J. did not refer to the fact that when Estey J. applied these views in *O'Hara*, he was alone in dissent.

Lamer J. cited with approval the reasons of Martin J.A. in *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2)*[187] and their endorsement by the Supreme Court of Canada in *The Attorney General of Canada v. Canadian National Transportation Ltd.*,[188] as establishing that "the inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons".[189] In *O'Hara v. British Columbia*,[190] the latter case was construed rather differently, as establishing that a province cannot establish an inquiry that compels a suspect to testify "under oath with respect to his involvement in a crime solely for the purpose of gathering sufficient evidence to lay criminal charges".[191]

Lamer J. also referred with approval to the decision of the Ontario Court of Appeal in *Re Nelles and Grange*,[192] and quoted the following "important observation":[193]

> A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes...Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility.

He also cited[194] a danger noted in *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2)*,[195] that had been cited in *Re Nelles and Grange*:

> What is important is that a finding or conclusion stated by the commissioner would be considered by the public as a determination and might well be

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186 *Starr v. Houlden*, *supra*, note 1, at 1396, quoting Estey J. in *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 190.

187 *Supra*, note 114.

188 *Supra*, note 24, at 43.

189 *Starr v. Houlden*, *supra*, note 1, at 1397-98.

190 *Supra*, note 17.

191 *Ibid.*, at 539.

192 *Supra*, note 17.

193 *Starr v. Houlden*, *supra*, note 1, at 1398, quoting from *Re Nelles and Grange*, *supra*, note 17, at 215-16.

194 *Starr v. Houlden*, *supra*, note 1, at 1398-99, quoting from *Re Nelles and Grange*, *supra*, note 17, at 220, which in turn referred to *R. v. Hoffman-La Roche Ltd. (Nos. 1 and 2)*, *supra*, note 114.

195 *Ibid.*

> seriously prejudicial if a person named by the commissioner as responsible for the deaths in the circumstances were to face such accusations in further proceedings. Of equal importance, if no charge is subsequently laid, a person found responsible by the commissioner would have no recourse to clear his or her name....

Lamer J. noted that, although in *Re Nelles and Grange* the constitutional validity of the order in council was not in issue, the limitations that were imposed by the court when interpreting the terms of reference "were designed to ensure that it stayed within provincial jurisdiction".[196]

Finally, Lamer J. considered the majority's decision in *O'Hara v. British Columbia*,[197] in which he had concurred.[198] In his view, the inquiry there at issue was concerned with investigating police misconduct rather than affixing criminal responsibility to a particular individual:[199]

> The judgment is a clear affirmation of the view that the pith and substance of a commission must be firmly anchored to a provincial head of power, and that it cannot be used either purposely or through its effect, as a means to investigate and determine the criminal responsibility of specific individuals for specific offences.

He came to this conclusion despite the fact that in *O'Hara* it had already been determined by one inquiry that there had been police misconduct, and the purpose of the inquiry at issue was to determine the identity of the wrongdoers. In *O'Hara*, there was no limitation in the terms of reference to prevent findings in relation to specific individuals. On the contrary, the purpose of the inquiry was to identify the individuals responsible so that they could be brought to justice and thus restore public confidence in the administration of law enforcement. One could similarly characterize the purpose of the inquiry in *Starr v. Houlden* as being to identify public officials who had had improper dealings with named persons who were suspected of such dealings, so that the officials could be brought to justice and thus restore public confidence in the integrity of government. One could also characterize the purpose of the inquiry in *Re Nelles and Grange*[200] as being to determine the cause of the baby deaths and restore public confidence in the hospital system.

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196 *Starr v. Houlden*, *supra*, note 1, at 1399.

197 *Supra*, note 17.

198 *Starr v. Houlden*, *supra*, note 1, at 1401.

199 *Ibid.*, at 1401-02.

200 *Supra*, note 17.

As noted above,[201] Lamer J. advocated a holistic approach in characterizing the constitutional matter of the inquiry, but he identified two factors as being "key":[202] (1) the fact that the only named parties were two private persons, alleged perpetrators rather than victims, and (2) the fact that the allegations being investigated bore a "striking resemblance" to a *Criminal Code* offence.[203] Lamer J. added as follows:[204]

> [I]t is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission *ultra vires* the province. But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing *Criminal Code* offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals. One of the implications for allowing the inquiry to go on in its present form is that the inquiry can compel a "witness" who is really one of the named "suspects" to answer questions under oath even though that person could not have been compelled to provide incriminating evidence against herself in the course of a regular police investigation, during the course of a preliminary inquiry under the *Code*...or during the course of a trial in which she is an accused.

Despite this reference to the effect of the inquiry on a witness who is also a suspect, it appears that the prime focus of the majority is on the purpose of the inquiry. Thus, if the inquiry were properly grounded in provincial jurisdiction, as a means of generating information and policies to inform provincial decision-making,[205] or as a means of regulating an activity within provincial jurisdiction,[206] it would be immaterial that a witness compelled to give testimony might be charged subsequently. However, if the predominant purpose of the inquiry is to investigate alleged wrongdoing through procedures more draconian than those available in criminal proceedings for the purpose of prosecuting the alleged wrongdoers, the inquiry constitutes an invalid invasion of federal jurisdiction over criminal law and procedure.

Lamer J. expressly recognized the usefulness of commissions of inquiry and asserted that the provinces "should be given ample room within their constitutional competence to establish public inquiries aimed at investigating,

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201 See *supra*, text accompanying note 11.

202 *Starr v. Houlden*, *supra*, note 1, at 1405.

203 *Criminal Code*, R.S.C. 1985, c. C-46.

204 *Starr v. Houlden*, *supra*, note 1, at 1409.

205 This would appear to be contemplated in *Re Nelles and Grange*, *supra*, note 17.

206 This would accommodate the decision in *O'Hara v. British Columbia*, *supra*, note 17.

studying and recommending changes for the better government of their citizens".[207]

He went on to define what a province cannot do, in the following terms:[208]

> What a province may not do, and what it has done in this case, is enact a public inquiry, with all its coercive powers, as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences.... In substance, the present inquiry offends the principle that a province cannot compel a person to submit to questioning under oath with respect to her involvement in a suspected criminal offence for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie* case.

Mme. Justice L'Heureux-Dubé was alone in dissent. In her view, the inquiry that was established in the light of "numerous alleged improprieties against government officials and employees" was within provincial jurisdiction over provincial officers, the management of charities, the administration of justice, and matters of a merely local or private natur[209] She considered it immaterial that the wording of the terms of reference was similar to a related criminal charge. The fact that individuals were named merely provided a necessary frame of reference for the inquiry, and the commission was authorized to petition to expand the terms of reference.

She noted that the persons named in the terms of reference had not been charged and that the background possibility of subsequent prosecution could not act as an absolute bar to a provincial inquiry that was otherwise constitutional.[210] In any event, the commissioner was precluded from expressing conclusions of legal responsibility, the commissioner's findings would not be admissible as proof in subsequent proceedings, nor could the testimony of witnesses be introduced to incriminate them.

She argued that the naming of the persons to be investigated, the use of language similar to that in the *Criminal Code*,[211] and the fact of concurrent police investigation are not individually fatal to the validity of the inquiry and that "stacking" these factors should not produce invalidity.[212]

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207 *Starr v. Houlden, supra*, note 1, at 1411.

208 *Ibid.*, at 1411-12.

209 *Ibid.*, at 1418.

210 *Ibid.*, at 1424.

211 *Supra*, note 203.

212 *Starr v. Houlden, supra*, note 1, at 1427.

She then reviewed the case law, noting that provincial inquiries were upheld (a) in *Faber v. The Queen*,[213] where the inquiry's sole purpose was to ascertain who might be charged with a particular homicide; (b) in *Di Iorio v. The Warden of the Common Jail of Montreal*,[214] where a distinction was made between police investigation of an individual and an investigative overview of crime on a collective basis; (c) in *Attorney General of Quebec v. The Attorney General of Canada*,[215] where the mandate was to investigate and report on various specific illegal acts by police that might lead to the identification of wrongdoers and the laying of criminal charges; and (d) in *O'Hara v. British Columbia*,[216] where the mandate was, in effect, to investigate which of six police officers was responsible for injuring a prisoner, which investigation led eventually to the conviction of one of the officers for aggravated assault. She agreed that a province cannot enact legislation enabling a police officer to require a suspect to give testimony under oath concerning involvement in a crime, but she also noted that, if the matter falls within the legitimate concern of a provincial Legislature, the province is entitled to establish an inquiry and compel testimony. She concluded, as had the majority in *O'Hara*, that it is only when an inquiry is enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the *Criminal Code* that it is *ultra vires* a province.[217] In her view, the inquiry was sufficiently related to areas of provincial concern, namely, the operation of provincial charities and the conduct of provincial officials. This type of connection had been sufficient in *O'Hara*.

It would appear, therefore, that there is a single fundamental distinction between the majority and dissenting reasons in *Starr v. Houlden*. The majority held that, in pith and substance, the inquiry was aimed at the investigation of criminal offences, albeit offences relating to matters within provincial jurisdiction. The dissent would have held that, since the alleged wrongdoing is related to provincial interests, the inquiry is not directed solely to the investigation of crime and is thus valid.

(8) Post Starr v. Houlden

The decision of the Supreme Court of Canada in *Starr v. Houlden*[218] has been considered in at least four subsequent cases. First, in *Fleischer v. B.C.*

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213 *Supra*, note 37.

214 *Supra*, note 24.

215 *Supra*, note 5.

216 *Supra*, note 17.

217 *Starr v. Houlden*, *supra*, note 1, at 1436-38.

218 *Ibid.*

(Coroner),[219] the British Columbia Supreme Court considered the constitutional validity of compelling a suspect to testify at a coroner's inquest into a death. In their investigation of a body found at the side of a highway, police had questioned Fleischer, who had declined to provide a statement. After examining Fleischer's car, the police arrested him, but later released him without laying charges. The coroner then called an inquest "because of the public interest in the case" and subpoenaed various witnesses, including Fleischer. The court was aware that Crown counsel intended to monitor the inquest.

The court concluded that the case law "draw[s] a clear distinction between compelling an accused facing charges to testify at an inquest and the existence of suspicion or a possibility of future charges while recognizing the unique public interest aspects of the coroner's inquest and its separation from the criminal justice process".[220] The court considered that the effect of the Supreme Court of Canada's decisions in *Starr v. Houlden* and *O'Hara v. British Columbia*[221] is that "the pith and substance of a commission must be firmly anchored to a provincial head of power and that it cannot be used either purposely or through its effect, as a means to investigate and determine the criminal responsibility of specific individuals for specific offences".[222] The court relied on the fact that the Supreme Court of Canada in *Starr v. Houlden* had specifically approved its earlier decision in *Faber v. The Queen*,[223] affirming the valid provincial purpose of a coroner's inquest.

The court thus assumed that all coroners' inquests, for whatever purpose, are valid because in general such inquests may serve provincial purposes. It is arguable, however, that the decision in *Starr v. Houlden* would require that a holistic assessment be made of the purpose for which a particular inquest is being conducted. The fact that there is "public interest in the case" would not likely be a sufficient provincial purpose to validate the inquiry in light of its potential usefulness in the investigation of a crime.

The second case to consider *Starr v. Houlden*[224] is *Cross v. Wood*.[225] In this case, police complaint proceedings against a police officer had been challenged on the basis of *Starr v. Houlden*. It was argued that the police officer

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219 (1990), 49 B.C.L.R. (2d) 23, [1991] 1 W.W.R. 156 (S.C.) (subsequent references are to 49 B.C.L.R. (2d)).

220 *Ibid.*, at 29.

221 *Supra*, note 17.

222 *Fleischer v. B.C. (Coroner)*, *supra*, note 219, at 32.

223 *Supra*, note 37.

224 *Supra*, note 1.

225 (1990), 74 D.L.R. (4th) 412, [1990] 6 W.W.R. 369 (Man. Q.B.), aff'd [1991] 2 W.W.R. 288 (Man. C.A.) (subsequent references are to 74 D.L.R. (4th)).

was a named party, some of the misconduct alleged against him, including assault and battery, constituted offences under the *Criminal Code*,[226] and that the proceedings were "a substitute criminal investigation and preliminary inquiry and therefore fall within Parliament's exclusive criminal law power".[227] Hansen J. relied on *O'Hara v. British Columbia*,[228] and concluded that investigating the conduct of a member of a provincial police force is clearly a matter falling within provincial jurisdiction.

In Saskatchewan, a provincial inquiry to examine allegations that officers of a Crown corporation "obtained money improperly" from a supplier was struck down as an invasion of federal jurisdiction over criminal law and procedure.[229] The inquiry was focused on two officers of the corporation who had been indicted in the United States and were under active investigation by the R.C.M.P. in relation to possible fraud charges. Matheson J. rejected the argument that the case should be distinguished from *Starr v. Houlden*[230] on the basis that the terms of reference did not name private individuals, that they investigated the affairs of public officers as opposed to private citizens, that they did not duplicate the provisions of a *Criminal Code* offence,[231] and that the inquiry was justified on a broad policy basis within provincial jurisdiction. He held that the inquiry was targeted at identifiable individuals and the fact that they were public officials did not mean that they were not entitled to the protections of the criminal process. Although the terms of reference did not direct the inquiry to examine whether the individuals had the *mens rea* of taking the money "corruptly", there would be "an almost irresistible inference of the requisite intention" once the commission determined if the money was improperly obtained.[232] Finally, he rejected that the province had demonstrated a legitimate policy objective for the inquiry, noting that the terms of reference focused on a single transaction and "do not purport to authorize an investigation into all the affairs of [the crown corporation], such as hiring and employment practices, authority of officers, marketing practices, etc.".[233] The terms of reference indicated that the dominant purpose of the inquiry was to investigate possible criminal activity resulting from an identifiable transaction and to authorize a parallel investigation to an ongoing police investigation.

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226 *Supra*, note 203.

227 *Cross v. Wood*, *supra*, note 225, at 417.

228 *Supra*, note 17.

229 *Castle v. Brownridge*, [1990] 6 W.W.R. 354 (Sask. Q.B.).

230 *Supra*, note 1.

231 *Criminal Code*, *supra*, note 203.

232 *Castle v. Brownridge*, *supra*, note 229, at 366.

233 *Ibid.*, at 367.

Following the release of the Supreme Court of Canada's decision in *Starr v. Houlden*,[234] the Colter Commission of Inquiry into the Niagara Regional Police Force was asked by counsel to rule on the effect of the decision, particularly with respect to the investigation of allegations against members of the Internal Investigation Team of the police force, and whether the inquiry is restricted from making any finding of misconduct that might show criminality.[235]

Commissioner Colter carefully reviewed the decisions of the Supreme Court of Canada in *Starr v. Houlden* and *O'Hara v. British Columbia*.[236] He derived the following principles from the two cases:[237]

(1) The pith and substance of a Provincial Commission must be firmly anchored to a Provincial head of power.

(2) A Commission may have a "double aspect". A matter may fall within Provincial jurisdiction as pertaining to the administration of justice, and may also fall within the scope of Federal jurisdiction over criminal law and procedure.

(3) In deciding whether the Terms of Reference of a Commission of Inquiry, which have a "double aspect", fall within Provincial or Federal jurisdiction, one must attempt to identify a predominant feature that outweighs the competing incidental aspect. For example, a province has a legitimate constitutional interest in determining the nature and reasons for inappropriate conduct of members of police forces under its jurisdiction.

That the uncovering of such conduct may later form the basis of a criminal charge, and thus impinge on Federal jurisdiction over criminal law and procedure, does not oust Provincial jurisdiction, provided the predominant feature of the Inquiry is the management of the means by which justice is administered in the province.

(4) In deciding what is the predominant feature of an inquiry, the Order-in-Council as a whole but with particular attention to the preamble and the circumstances leading to the Inquiry, should be examined to ascertain whether there is a broad policy basis for the Inquiry rooted in a Provincial head of power.

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234 *Supra*, note 1.

235 Ontario, Royal Commission of Inquiry into the Niagara Regional Police Force, *Ruling*, unreported (April 30, 1990) (hereinafter referred to as the "Colter Commission Ruling").

236 *Supra*, note 17.

237 Colter Commission Ruling, *supra*, note 235, at 38-39.

Commissioner Colter concluded that the inquiry over which he presides is distinguishable from that in *Starr v. Houlden* and similar to that in *O'Hara v. British Columbia*. He noted that, unlike the Starr inquiry, (1) no individuals had been named in the terms of reference; (2) the terms of reference were not analogous to the elements of a specific criminal offence; (3) there had been no statement of intent to punish and prosecute wrongdoers; (4) there is no ongoing police investigation separate from the Inquiry; and (5) there is a broad policy basis for the inquiry, namely loss of public confidence in the operation and administration of the police force.

The commissioner further found that he is obliged and entitled to examine allegations that might be related to specific individuals and might, as an incident of such investigation, discover criminal conduct. He concluded that "the incidental criminal aspect does not undermine the basic principle of examining the management of the means by which justice is administered".[238] Nonetheless he stated as follows:[239]

> [T]he great concern shown in *Starr* over the coercive nature of an Inquiry's methods of obtaining evidence persuades me that great care should be taken to avoid whenever possible the naming of names in my report.
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> ....
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> In the course of carrying out the mandate of the Order-in-Council, it may at times be impossible to avoid incidental identification of some person involved in undesirable practices in the administration of the Force, but no persons will be unnecessarily identified and no conclusions of law regarding civil or criminal responsibility will be made.

c. *Conclusion: The Impact of the Federal Criminal Law Power on Provincial Jurisdiction to Establish Inquiries*

Starr v. Houlden[240] confirms that the validity of a provincial inquiry is assessed on ordinary constitutional principles: the "matter" of the inquiry is characterized by identifying its predominant features and a determination is made whether it is properly grounded in provincial jurisdiction or constitutes an invalid invasion of federal jurisdiction over criminal law and procedure. The same incident may have a double aspect so that it may properly be the subject of

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238 *Ibid.*, at 46.

239 *Ibid.*, at 47-48.

240 *Supra*, note 1.

investigation both as a matter of provincial law and as a matter of federal criminal law. Where the inquiry serves a valid provincial purpose, it is immaterial that a witness compelled to testify may subsequently be subject to criminal charges.

The majority acknowledged that a provincial inquiry may be authorized to investigate specific allegations of wrongdoing, provided that the investigation is firmly anchored to a provincial head of power. Where the allegations are analogous to criminal offences, as they were in *Starr v. Houlden*, it appears that the inquiry is likely to be considered an invalid attempt to supplant the restrictive investigative procedures of criminal proceedings unless it can be established that the investigation is intended to serve broad policy-making functions within provincial jurisdiction. It also appears to be arguable that such an inquiry is valid if it serves regulatory functions within provincial jurisdiction, for example, regulation of police conduct.

On the basis that the province has regulatory and disciplinary authority over its police forces and their members, it appears there is considerable scope for provincial inquiries into allegations of police misconduct. A provincial inquiry may be established for the purpose of making recommendations to prevent the conditions which generate such misconduct,[241] or for the purpose of investigating those found to have engaged in wrongful acts.[242] The province is entitled to establish standards for those persons exercising powers and privileges conferred by provincial legislation, and to enforce compliance with those standards.

The province cannot, however, establish an inquiry for the purpose of identifying individuals who have engaged in wrongdoing, with a view to bringing them to justice in criminal proceedings. In determining that the *Starr* inquiry was invalid, the majority in the Supreme Court of Canada found that the inquiry was not aimed at assessing the adequacy of the regime governing the conduct of public officials or restoring public confidence in the integrity of government. Rather, its terms of reference focused on investigating alleged misconduct by two private persons in their dealings with public officials. The alleged misconduct constituted a criminal offence, and could not in itself be the focus of a provincial inquiry. It was not sufficient that the allegations of wrongdoing related to matters within provincial jurisdiction, in this case the integrity of provincial officials and the operation of provincial charities. The inquiry itself had to serve a provincial purpose over and above any benefit to be derived from identifying what had been done and by whom.

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241 *Attorney General of Quebec v. The Attorney General of Canada, supra*, note 5.

242 *O'Hara v. British Columbia, supra*, note 17.

This purposive approach to the validity of provincial inquiries contrasts with the formalistic approach taken in the various coroners' inquest cases, which hold that a coroner's inquest, no matter what its actual purpose, has jurisdiction to compel a suspect to testify, but not an accused. As discussed below, assuming that a coroner's inquest serves valid provincial purposes, there appears to be no reason why an accused and a suspect should be treated differently.

Applying a purposive analysis, it would appear that a coroner's inquest is valid to the extent that it serves provincial purposes in educating and reassuring the public. When it has been determined whether the death was deliberate or accidental, and what if any steps might be taken to prevent other such deaths, the provincial purposes will have been served, and further questioning for the purpose of identifying the person who caused the death would arguably exceed the coroner's jurisdiction.

(ii) The Operation of Federal Institutions

A provincial inquiry that is otherwise valid cannot be empowered by the province to inquire into the internal management and operation of federal institutions. In *Attorney General of Quebec v. The Attorney General of Canada*,[243] the Supreme Court of Canada held, unanimously on this point, that a provincial commission of inquiry into allegations of wrongdoing by members of various police forces cannot be authorized to extend its inquiry into the administration and management of the R.C.M.P. for the purpose of recommending changes in the regulations and practices of the federal force:[244]

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

As Estey J. noted in concurring reasons, "neither plenary authority may investigate the undertaking of an agency validly established by the other plenary authority".[245] This aspect of the decision was subsequently applied by the

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243 *Supra*, note 5.

244 *Ibid.*, at 180.

245 *Ibid.*, at 194.

Supreme Court of Canada in *The Attorney General of Alberta v. Putnam*,[246] in which a majority of the court further held that a province has no authority to authorize an inquiry into a complaint against R.C.M.P. officers, even though they were engaged in providing municipal policing services under contract between the province and the R.C.M.P. Laskin C.J.C., for the majority, cited the ruling in *Attorney General of Quebec v. The Attorney General of Canada* as a "constitutional impediment"[247] to the inquiry, and also held that the valid provincial interest in providing for effective policing arrangements did not enable the province, as one contracting party, "to invade the organization adopted by the other contracting party in the delivery of the services contracted for under the arrangement".[248]

In *O'Hara v. British Columbia*,[249] a majority of the court confirmed that, in establishing public inquiries, "a province may not rely on its jurisdiction over the 'Administration of Justice in the Province' to intrude into the management of a federal organization".[250]

Subsequent to its decisions in *The Attorney General of Alberta v. Putnam* and *O'Hara v. British Columbia*, the court has confirmed, in another line of cases, that a province cannot confer upon an inquiry the authority to investigate the internal management and policies of a federal institution or interprovincial undertaking. In *Canadian National Railway Co. v. Courtois*,[251] a provincial occupational health and safety commission appointed an inspector to investigate a collision between two C.N.R. trains in which three railway employees were killed and a fourth injured. The inspector was empowered (1) to investigate and compel testimony to determine the causes of the accident; (2) to recommend changes to rules, practices and methods of operation to ensure the safety of personnel; and (3) to order implementation of the recommendations. The Supreme Court of Canada held that the statutory regime, which "regulates, directly and massively, the working conditions, labour relations and management of the undertakings to which it applies",[252] could not apply to an interprovincial railway. The court further concluded that the investigative provisions were inoperative with respect to undertakings within federal jurisdiction since such

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246 *Supra*, note 64.

247 *Ibid.*, at 265.

248 *Ibid.*

249 *Supra*, note 17.

250 *Ibid.*, at 539.

251 *Supra*, note 6. See, also, the 2 companion cases: *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161, and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*,[1988] 1 S.C.R. 897, 51 D.L.R. (4th) 253.

252 *Canadian National Railway Co. v. Courtois*, *supra*, note 6, at 890.

provisions "must be characterized and classified like the *Act*, as it is a key part of its prevention policy and an essential means of attaining the objective of the *Act*, mentioned in s. 2: 'the elimination, at the source, of dangers to the health, safety and physical well-being of workers' ".[253]

In *Di Iorio v. The Warden of the Common Jail of Montreal*,[254] Dickson J. commented that, even though a provincial inquiry is not entitled to conduct a coercive investigation into the operation of federal institutions, it may "submit a report in which it appeared that changes in federal laws would be desirable".[255] In *Attorney General of Quebec v. The Attorney General of Canada*,[256] Pigeon J. clarified as follows:[257]

> The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The Commission might, therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.

Accordingly, a provincial inquiry cannot be authorized to investigate the management or operation of a federal undertaking, nor can it do so as an incidental part of an otherwise valid inquiry. Thus an inquiry cannot compel a witness to testify about or produce documents in relation to such matters. In making recommendations, however, an inquiry is not precluded from indicating that relevant changes would be desirable in federal laws.

(iii) The Federal Power to Appoint Superior Court Judges

A third restraint on provincial jurisdiction to establish public inquiries arises as a consequence of federal jurisdiction to appoint superior, county, and district court judges under section 96 of the *Constitution Act, 1867*.[258] Judicial

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253 *Ibid.*, at 890-91.

254 *Supra*, note 24.

255 *Ibid.*, at 530.

256 *Supra*, note 5.

257 *Ibid.*, at 180.

258 *Supra*, note 3. Section 96 provides as follows:

powers of the sort exercised by such courts cannot be conferred on a provincially appointed tribunal. Presumably this concern accounts for the fact that the inquiries in *Re Nelles and Grange*[259] and *Starr v. Houlden*[260] were restricted in their terms of reference from drawing conclusions not only about criminal responsibility, but also about civil liability.

It is now well established[261] that determining whether a tribunal is exercising the jurisdiction of a section 96 court involves a three-step inquiry:

1. Is the tribunal's authority analogous to that exercised by a superior, district, or county court at the time of Confederation?

2. If the answer to the first question is in the affirmative, is the function exercised by the tribunal a judicial function, that is, does it involve the impartial determination of rights between parties on the basis of a recognized body of rules, fairly applied, rather than a policy choice based on an assessment of what is best for the community as a whole?

3. If the answer to the second question is in the affirmative, is the adjudicative function the sole or central function of the tribunal, or is it merely ancillary to the tribunal's broader administrative and policy-making role?

The Ontario Court of Appeal has distinguished the role of a commissioner from an adjudicative role on the following basis:[262]

> It has been said time and again...that the function of a Commissioner under the *Public Inquiries Act* is fundamentally different in its essential nature from that of a Judge, an arbitrator or an administrative tribunal which deals with rights between parties. Here there are no parties. The Commissioner's duty is to inquire and to report.

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

259 *Supra*, note 17.

260 *Supra*, note 1.

261 *In the matter of a Reference to the Court of Appeal pursuant to The Constitutional Questions Act, R.S.O. 1970, Chapter 79, by Order in Council No. 2089/79 respecting the Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554.

262 *Re Ontario Crime Commission*, [1963] 1 O.R. 391, at 397, 37 D.L.R. (2d) 382, at 388. See, also, *Re First Investors Corp. Ltd.; Re Associated Investors of Canada Ltd.*, *supra*, note 153.

Section 96 also limits the jurisdiction of an inquiry in that, even if provincial legislation purports to confer upon a commission of inquiry all the powers of a judge of the Superior Court, it cannot confer the status, authority, or inherent jurisdiction of a superior court:[263]

> The Commissioner does not enjoy the status of a superior Court, he has only a limited jurisdiction. His orders are not like those of a superior Court which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack.
>
> Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior Courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded.

It follows that, since the provincial Legislature cannot confer the authority of a superior court on a commission of inquiry, it also cannot exclude judicial review of the constitutional limits on the commission's jurisdiction.[264]

Accordingly, a provincial inquiry cannot be authorized to exercise the judicial powers of a superior court *per se*, cannot be given inherent jurisdiction, and cannot be insulated from judicial review. Its jurisdiction is limited and the scope and exercise of its authority is subject to review.

(d) WITNESSES AND EVIDENCE NON-COMPELLABLE ON CONSTITUTIONAL GROUNDS

(i) Suspects and Accused

As a result of the Supreme Court of Canada's decisions in *Batary v. The Attorney General for Saskatchewan*[265] and *Faber v. The Queen*,[266] courts have considered that a person charged with a criminal offence is exempt, for all purposes, from being compelled to testify in a public inquiry related to the offence, but that a person merely suspected of an offence is compellable. In light of the recent case law, however, this distinction might be open to some doubt.

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263 *Attorney General of Quebec v. The Attorney General of Canada*, *supra*, note 5, at 185-86.

264 *Crevier v. The Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1. See, also, Hogg, *supra*, note 10, at 163-64.

265 *Supra*, note 32.

266 *Supra*, note 37.

As a matter of federal criminal law and procedure, a person charged with an offence cannot be compelled to give a statement to the police or to testify under oath, but neither can a person suspected of an offence be compelled to give a statement. Whether a person is a suspect or an accused at the time of the inquiry is largely fortuitous. In *Attorney General of Quebec v. The Attorney General of Canada*,[267] Estey J. suggested that "[t]he circumstance, sometimes almost accidental or at least undirected, of the existence or non-existence of a charge by indictment, information or otherwise, is not, in my view, of controlling significance when determining the constitutional status of a process such as we are now considering".[268]

Since it is the purpose of the inquiry that determines its constitutional validity, it would appear to be irrelevant, for jurisdictional purposes, whether a particular witness is a suspect or an accused. In *Starr v. Houlden*,[269] the majority appears to have abandoned the distinction, holding that "a province cannot compel a person to submit to questioning under oath with respect to her involvement in a suspected criminal offence for the purpose of gathering sufficient evidence *to lay charges* or to gather sufficient evidence *to establish a prima facie case*".[270] It would seem to follow that, where a provincial inquiry does meet the purposive test, there is no jurisdictional impediment to compelling testimony relevant to those purposes, even from a person charged with a criminal offence. The impact on criminal procedure, that is, the non-compellability of an accused, would be an incidental effect, the impact of which would be limited by operation of the protections of the Evidence Acts[271] and sections 7 and 13 of the Charter. In such a case, the commissioner should require that questions be tailored carefully so as not to intrude on matters that are not necessary to the purposes of the inquiry, and, as commissioner Colter noted, should refrain from unnecessary identification of wrongdoers and express no conclusions of law regarding civil or criminal responsibility.[272]

(ii) Federal Ministers

In *Attorney General of Quebec v. The Attorney General of Canada*,[273] the Supreme Court of Canada considered whether the federal Solicitor General could

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267 *Supra*, note 5.

268 *Ibid.*, at 191.

269 *Supra*, note 1.

270 *Ibid.*, at 1411-12 (emphasis added).

271 See *Canada Evidence Act*, *supra*, note 22, and *Evidence Act*, *supra*, note 22.

272 Colter Commission Ruling, *supra*, note 235, at 47-48.

273 *Supra*, note 5.

be compelled to testify before a provincial inquiry. Pigeon J. held that the power of a commission of inquiry to compel the attendance of witnesses and the production of documents depends on statutory authority, and that "it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada".[274] This result is consistent with the court's conclusion, discussed above, that provincial legislation cannot authorize a commission to inquire into the management of a federal undertaking.

(iii) Privileged Communications as a Matter of Federal Law

Section 11 of the *Public Inquiries Act*[275] provides as follows:

> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

There are constitutional limits on provincial jurisdiction to alter this provision so as to authorize an inquiry to compel testimony in breach of some evidentiary privileges that constitute principles of criminal law. Thus, in *The Solicitor General of Canada v. The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario*[276] and *Bisaillon v. Keable*,[277] the Supreme Court of Canada held that provincial commissions with authority to inquire into the use of informers by police were precluded from compelling disclosures that would breach the police informer privilege. In *Bisaillon v. Keable*, the Supreme Court of Canada held that (1) the police informer privilege may be set aside only if necessary in order to demonstrate the innocence of an accused person;[278] (2) the evidentiary privilege is supported by a duty on the police to maintain confidentiality of the informer's identity outside judicial proceedings;[279] (3) the privilege cannot be waived by the Crown without the informer's consent;[280] (4) unlike Crown privilege, neither the minister nor the court has the power to weigh the various interests involved and order disclosure;[281] (5) the police informer's privilege is a rule of criminal law over which Parliament has exclusive jurisdiction, since it results in a rule of evidence

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274 *Ibid.*, at 181.

275 R.S.O. 1990, c. P.41.

276 [1981] 2 S.C.R. 494, 128 D.L.R. (3d) 193.

277 *Supra*, note 55.

278 *Ibid.*, at 219-20.

279 *Ibid.*, at 221-22.

280 *Ibid.*, at 220.

281 *Ibid.*, at 222-23.

for criminal proceedings and provides essential support for the investigation of criminal offences;[282] (6) even if the province could legislate regarding the operation of the privilege in proceedings over which it has jurisdiction, any such legislation that authorized breach of the privilege would be in conflict with the federal law and inoperative since it would destroy the basis of the privilege for all purposes and undermine the effectiveness of criminal investigation;[283] and (7) the Legislature had not in any event altered the common law rule.[284]

Thus, even though an inquiry is validly established for provincial purposes, the means available to conduct the inquiry might be limited by exclusionary principles of federal evidence law that are not discretionary, that are necessary to the effective conduct of the criminal process, and that would be undermined if disclosure is permitted in other proceedings.

(e) PROVINCIAL JURISDICTION TO PROTECT INQUIRY WITNESSES AGAINST THE USE OF THEIR TESTIMONY IN OTHER PROCEEDINGS

To the extent that a witness can be compelled to testify at a provincial inquiry about matters that she could not be compelled to disclose in a police investigation or at a criminal trial, it is important to consider whether the province can protect the disclosures, or evidence derived therefrom, from being admitted in a criminal proceeding. Where evidence is generated for the purposes of the inquiry and would not be available otherwise, it is arguable that it ought not to be admissible in criminal proceedings. The Charter[285] provides significant protection, as is discussed in the next section of this chapter. In addition, as Dickson J. determined in *Di Iorio v. The Warden of the Common Jail of Montreal*,[286] a witness before a provincial inquiry is a witness within the meaning of section 5(2) of the *Canada Evidence Act*[287] and can claim its

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282 *Ibid.*, at 229-31.

283 *Ibid.*, at 231-32.

284 *Ibid.*, at 224-28.

285 Section 13 provides as follows:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

See also the case law considering the extent to which s. 7 of the Charter protects the right to silence and the right against self- incrimination, discussed *infra*, this ch., sec. 2(d).

286 *Supra*, note 24, at 537-39, citing *Klein v. Bell*, [1955] S.C.R. 309, [1955] 2 D.L.R. 513.

287 *Supra*, note 22.

protection, which is limited to the exclusion of evidence that incriminates the witness.[288]

It remains to consider whether the province has jurisdiction to limit the admissibility in criminal proceedings of evidence that was obtained by virtue of an inquiry's authority to compel testimony.

In *Klein v. Bell*,[289] the Supreme Court of Canada held that a provision of the British Columbia *Evidence Act*[290] requiring a witness to respond to questions, but providing that incriminating answers would not be admissible against the witness in criminal proceedings, was invalid insofar as it purported to regulate proceedings within federal jurisdiction.[291]

Similarly, in *Reference re Legislative Privilege*,[292] the Ontario Court of Appeal held that it would be beyond the jurisdiction of a province to provide that a court in a criminal case cannot compel a member of the Legislature to disclose the source and contents of confidential communications. In effect, the province would be specifying that a communication that is not recognized as privileged at common law is to be treated as privileged in criminal proceedings. Provincial jurisdiction would extend this far only if it could be established that the privilege is necessary to the effective functioning of the provincial Legislature.[293]

Seeking to impose a new rule of privilege on criminal proceedings involves limiting criminal courts from hearing evidence that is otherwise admissible. Arguably, different considerations could apply when a province seeks to specify limits on the use that can be made of evidence that would not exist but for the exercise of provincial authority to compel testimony before an inquiry. In the latter case there would appear to be a stronger argument that a limitation on use of the evidence in federal proceedings is necessarily incidental to the effective exercise of provincial jurisdiction. Thus, it might be argued that where a province is entitled to compel testimony for proper purposes, it is also

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288 Note, however, that s. 5 of the *Canada Evidence Act*, *ibid.*, might be open to challenge under the Charter. See *Thomson Newspapers Ltd. v. Canada*, *supra*, note 150, at 172-75, *per* Lamer J.

289 *Supra*, note 286.

290 R.S.B.C. 1948, c. 113.

291 See, also, the comments of Cartwright J., in *Marshall v. The Queen*, [1961] S.C.R. 123, (1960), 26 D.L.R. (2d) 459 (subsequent references are to 26 D.L.R. (2d)) holding, at 463-64, that a provincial law excluding certain evidence "in any trial" could apply only to proceedings within provincial jurisdiction.

292 (1978), 18 O.R. (2d) 529, 83 D.L.R. (3d) 161 (C.A.).

293 See the discussion in Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (1981), at 102-06.

entitled to protect the witness against the use of that testimony for purposes for which it could not be compelled. Otherwise, concern about the unfair use to which the evidence might be put could effectively deter the proper exercise of provincial jurisdiction. Unfortunately, however, the decision in *Klein v. Bell*[294] suggests that the courts are not likely to uphold provincial attempts to regulate proceedings within federal jurisdiction.

2. THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(a) POWERS TO COMPEL TESTIMONY AND THE PRODUCTION OF EVIDENCE

Section 7(1) of the *Public Inquiries Act*[295] provides as follows:

> 7.—(1) A commission may require any person by summons,
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> (a) to give evidence on oath or affirmation at an inquiry; or
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> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
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> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

The language of the section is relatively broad, giving a commission the power to require any person to testify or to produce anything the commission may specify. However, it is subject to some limitations.

First, a commission has the power to require only evidence or the production of documents that are relevant to the subject matter of the inquiry. While a summons is issued, in practice, as a matter of course, there seems little doubt that if the applicant can show that she has no relevant evidence to offer, the summons may be quashed.[296] Second, no mention is made of possible situations in which the witness is non-compellable. It cannot be taken for granted that, in the context of a public inquiry, all persons are, if competent, compellable. As noted earlier in this report,[297] the recent decision of the Supreme

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294 *Supra*, note 286.

295 *Supra*, note 275.

296 *Re R. and McConnell* (1977), 35 C.C.C. (2d) 435 (Sask. C.A.), and *Re Hatfield and Smith* (1980), 30 N.B.R. (2d) 704, 70 A.P.R. 704 (Q.B.).

297 *Supra*, ch. 2, sec. 5.

Court of Canada in *MacKeigan v. Hickman*[298] held that judges had immunity from testifying at a public inquiry with respect to either their judicial or administrative functions.

Thomson Newspapers Ltd. v. Canada[299] makes it clear that being under constraint of a subpoena or summons to appear as a witness is, in itself, a deprivation of liberty so as to trigger the application of section 7 of the Charter.[300] Therefore, a summons must accord with the principles of fundamental justice. Where the individual summoned as a witness is already accused of an offence, section 11(*c*) of the Charter, which provides that a person charged with an offence has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence", might not apply since the public inquiry proceedings are not against him in respect of any offence. Nevertheless, section 7 of the Charter might operate to render an accused person non-compellable, even at the inquiry stage.[301] This is discussed below.

Section 9 of the *Public Inquiries Act*[302] provides as follows:

> 9.—(1) A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.
>
> (2) A witness shall be informed by the commission of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

Section 9(1) contains two provisions. The first, which deems a witness to have objected to answer certain questions, is procedural. The second, which provides that no answer shall be used against the witness in subsequent proceedings, is substantive, although it is merely a repetition of what is to be found in the Canada and Ontario Evidence Acts.[303] As discussed above, insofar as the second provision purports to enact that such answers shall not be used or

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298 *Supra*, note 164.

299 *Supra*, note 150. The case is discussed, *infra*, this ch., sec. 2(d).

300 Reproduced *infra*, this ch., sec. 2(d).

301 See *Batary v. The Attorney General for Saskatchewan*, *supra*, note 32, which, before the Charter, struck down provincial legislation purporting to make an accused person a compellable witness at a coroner's inquest on the ground that this was an intrusion into federal criminal jurisdiction.

302 *Supra*, note 275.

303 See *supra*, note 22.

receivable in evidence in subsequent criminal proceedings, it might be *ultra vires* the province, as might be the exception with respect to "a prosecution for perjury". Subsequent criminal prosecutions, including evidential rules of admissibility, are governed by federal law.[304] Accordingly, it is likely that a provincial law enacting that such answers are not to be used or receivable can apply only to civil or administrative proceedings or to the prosecution of provincial offences. Nevertheless, the present federal law, section 5 of the *Canada Evidence Act*,[305] provides the same protection as section 9 of the *Public Inquiries Act* purports to provide.

The procedural provision in section 9(1) of the *Public Inquiries Act* was inserted because of the construction placed by the courts on section 5 of the *Canada Evidence Act*, and the corresponding section of the Ontario *Evidence Act*,[306] to the effect that the protection offered by those sections is available only where the witness first objects to answering the question. Absent any such objection, there was no protection.[307] There is, in fact, no case that discusses whether a provincial statute enacting that a witness shall be deemed to have objected would satisfy a federal requirement in a criminal prosecution that the witness must first object before the protection of section 5 of the *Canada Evidence Act* is available. It might be argued that, since the crucial time for the objection is at the time of the first proceeding, if a provincial statute enacts that a witness is deemed to have objected, then she has objected. On the other hand, it could be argued that whether the answer is receivable or not in a subsequent criminal prosecution is to be governed by federal evidentiary law, and if that law requires an express objection, then a province has no jurisdiction to substitute a deemed objection. In any event, as we shall discuss below, in view of section 13 of the Charter,[308] the problem is essentially academic.

Section 9(2) of the *Public Inquiries Act*[309] also seems designed to protect a witness who does not know of the necessity of objecting in order to obtain the subsequent protection. However, if by section 9(1) that person is deemed to have objected, section 9(2) seems quite unnecessary, unless, as discussed above, there was some fear that section 9(1) might not be sufficient to activate the protection in a subsequent criminal prosecution.

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304 See *Marshall v. The Queen*, *supra*, note 291.

305 *Supra*, note 22.

306 *Supra*, note 22, s. 9.

307 See, for example, *R. v. Tass* (1946), 54 Man. R. 1, [1946] 3 D.L.R. 504 (C.A.), aff'd [1947] S.C.R. 103, [1947] 1 D.L.R. 497.

308 Reproduced *infra*, this ch., sec. 2(c).

309 *Supra*, note 275.

The substantive part of section 9(1) of the Act has two aspects that should be noted. First, the section concerns the introduction of answers given at a public inquiry not only in criminal trials, but in "any trial or other proceedings", that is, civil trials and administrative proceedings. These provisions might exceed the protection afforded by section 13 of the Charter.

The second aspect that should be noted is that there are differences in the wording of the statutory and Charter protections. Section 13 of the Charter provides that "any evidence so given" may not be used, whereas section 9 of the Act provides that any "answer" may not be used. In addition, section 13 of the Charter provides that it cannot be used to "incriminate" the witness, whereas section 9 provides that it "shall [not] be used or be receivable in evidence" against the witness. As we shall discuss below, this might affect the scope and operation of the privilege in those cases in which section 9 is applicable, that is, civil or administrative proceedings or prosecutions for provincial offences.

(b) DOCUMENTS AND OTHER EVIDENCE

Neither section 9 of the *Public Inquiries Act*,[310] nor section 13 of the Charter (nor the relevant provisions of the Evidence Acts) makes specific reference to any privilege that might arise from being compelled to produce incriminating documents or other things. This problem differs from that involved in the discovery of incriminating documents or other things as a result of oral testimony, which is discussed below. The problem addressed in this section is whether there is any protection provided when a person is compelled to produce the documents or other things.

Since the privilege against self-incrimination at common law embraces the right to refuse to answer, if the privilege extends to documents then it would seem to follow that at common law there is a right to refuse to produce those documents. Indeed, this does appear to be the case.[311] In Canada, since the statutory privilege against self-incrimination applies only in regard to subsequent use of compelled answers, it would seem to follow that if the privilege applies in respect of compulsorily produced documents, it would apply to prevent only their subsequent use and would not extend to a right to refuse to produce the documents in the first instance.

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310 *Supra*, note 275.

311 *Spokes v. The Grosvenor and West End Railway Terminus Hotel Co.*, [1897] 2 Q.B. 124, [1895-9] All E.R. Rep. Ext. 1779 (C.A.), and *Hunnings v. Williamson* (1883), 10 Q.B.D. 459. See now, in England, *Civil Evidence Act 1968*, c. 64 (U.K.), s. 14(1). See, also, *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434 (H.L.).

In *R.v. Simpson*,[312] the British Columbia Court of Appeal held that since the *Canada Evidence Act*[313] referred only to answers, documents that had been required to be produced at an inquiry over the objections of the accused could be introduced at his subsequent trial. However, in *Klein v. Bell*,[314] no member of the Supreme Court of Canada dissented from the view that the protection against subsequent use does extend to the production of documents, although this might be regarded as *obiter*. In *R. v. Judge of the General Sessions of the Peace for York; Ex parte Corning Glass Works of Canada Ltd.*,[315] the Ontario Court of Appeal also held, although again in *obiter*, that this was the case. The weight of authority in Canada would therefore lead to the conclusion that the protection afforded under the *Canada Evidence Act*[316] and the Ontario *Evidence Act*[317] does extend to the subsequent use of compulsorily produced documents. Nevertheless, protection against use of documents compelled for production at a public inquiry on subsequent proceedings could be more clearly extended in the *Public Inquiries Act*[318] or the Ontario *Evidence Act*. We note, however, that this would apply only to matters within provincial competence. Protection against the use of such documents in criminal trials would depend on an explicit judicial interpretation of either the *Canada Evidence Act* or the Charter to that effect, or a legislative amendment to that effect in the *Canada Evidence Act*.

In *R. v. Spyker*,[319] a question arose as to the admissibility of a statement compelled by statute. Under section 11 of the British Columbia *Insurance (Motor Vehicle) Act*,[320] a person involved in an automobile accident is required to make a statement to the insurance adjuster as to the circumstances of the accident (a provision that is common to most provinces). While the provincial Act provides for the confidentiality of the statement, the accused was charged under the *Criminal Code*[321] with dangerous driving causing death so that any provincial evidentiary provision was inapplicable. The Crown sought to admit the statement. Shaw J. held that the use of the statement that had been compelled from the accused would be to conscript the accused against himself. It was a principle of fundamental justice that a person could not be forced to provide

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312 59 B.C.R. 132, [1943] 3 D.L.R. 355 (C.A.), leave to appeal to the S.C.C. refused [1943] 3 D.L.R. 367, 80 C.C.C. 78 (S.C.C.).

313 R.S.C. 1927, c. 59.

314 *Supra*, note 286.

315 [1971] 2 O.R. 3, 16 D.L.R. (3d) 609 (C.A.), leave to appeal to S.C.C. refused [1971] 2 O.R. 11*n*, 16 D.L.R. (3d) 617*n* (S.C.C.).

316 *Supra*, note 22.

317 *Supra*, note 22.

318 *Supra*, note 275.

319 (1990), 63 C.C.C. (3d) 125, 29 M.V.R. (2d) 41 (B.C.S.C.).

320 R.S.B.C. 1979, c. 204.

321 *Supra*, note 203.

information incriminating himself without, at the same time, being afforded protection against its use on subsequent criminal proceedings against him.

Section 13 of the Charter[322] can guide legislative reform. Unlike section 9(1) of the *Public Inquiries Act*,[323] which provides protection against subsequent use of any "answer given by a witness", section 13 of the Charter protects against subsequent use of "any incriminating evidence so given", although the section does contemplate "[a] witness who testifies". While this might mean only a witness who gives *viva voce* evidence, there would seem to be no reason to so limit the provision. To do so would limit the protection provided by the Charter in a situation that would appear to involve the interests and purposes underlying the right. Section 13 is intended to protect a witness who might otherwise be compelled to provide evidence supporting his own prosecution; and if this applies to *viva voce* answers, it should apply equally to the production of documents. The practical effect of this protection against the subsequent use of documents or other evidence produced at a public inquiry should not be underestimated. If the evidence is vital to the subsequent prosecution, production of the documents at the public inquiry will effectively grant a person immunity from a subsequent conviction. Again, it must be emphasized that this result depends on either the inclination of the courts to interpret the protections of the Charter or the relevant Evidence Acts broadly, or specific statutory amendments by both the provincial and federal governments within their respective spheres of jurisdiction.

(c) PROTECTION OF SECTION 13 OF THE CHARTER

Section 13 of the Charter provides as follows:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

The wording of section 13 is relatively straightforward. There is no necessity for the witness to object at the time she gives the testimony; there is no need for the witness to be compelled to testify.[324] Moreover, the protection provided by the section is against use of evidence in "any other proceedings", thus including civil or administrative proceedings, in addition to criminal proceedings.

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322 Reproduced *infra*, this ch., sec. 2(c).

323 *Supra*, note 275.

324 *Dubois v. The Queen*, [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503.

The prohibition contained in section 13 is against the use of any incriminating evidence "to incriminate" the witness in another proceeding. Section 5 of the *Canada Evidence Act*,[325] and the corresponding section of the Ontario *Evidence Act*,[326] prohibit the use of such testimony being "used or admissible in evidence against" such witness. Thus, in a literal sense, the protection in section 5 of the *Canada Evidence Act* is wider than that in section 13 of the Charter. In *R. v. Kuldip*,[327] the question was whether prior testimony could be used in subsequent proceedings to cross-examine a witness as to a prior inconsistent statement. The Ontario Court of Appeal had held that since the weight of authority under section 5 of the *Canada Evidence Act*, preceding the Charter, was in favour of prohibiting such use, such use would also be prohibited under section 13 of the Charter. Accordingly, use of the evidence, even for the purpose of cross-examination, would also be for the purpose of incriminating the witness. However, this decision was reversed by the Supreme Court of Canada. In the view of the court, the protection under section 13 was limited to circumstances in which the prior testimony was sought to be used to incriminate, and the purpose of cross-examination on a prior inconsistent statement was to attack the credibility of a testifying witness, not to incriminate. It is now settled, therefore, that prior testimony may not be used as part of the case for the prosecution, but may be used, even by the Crown, in cross-examination of the witness, even when that witness is also the accused in a subsequent prosecution. Thus, the protections under the relevant Evidence Acts and section 9(1) of the *Public Inquiries Act*,[328] against the use of evidence in subsequent proceedings, are wider than required under section 13 of the Charter.

It should be noted, however, that in *R. v. Kuldip*[329] the accused had testified voluntarily in the first proceeding. It might be that, if the witness is compelled to testify at the first proceedings, any use of the testimony in subsequent proceedings in which the witness is the accused would violate section 7 of the Charter and the principles of fundamental justice, discussed below.

(d) PROTECTION OF SECTION 7 OF THE CHARTER WITH RESPECT TO COMPELLED TESTIMONY

Section 7 of the Charter provides as follows:

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325 *Supra*, note 22.

326 *Supra*, note 22.

327 [1990] 3 S.C.R. 618, 61 C.C.C. (3d) 385, rev'g (1988), 24 O.A.C. 393, 40 C.C.C. (3d) 11 (C.A.).

328 *Supra*, note 275.

329 *Supra*, note 327.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Early Charter authority suggests that the conduct of public inquiries is not affected by the rights contained in section 7 of the Charter. In *Re Rosenberg and Morrison*[330] it was held that since an inquiry merely investigates and reports, even if its activities affected a person's reputation—assuming reputation is part of the "life, liberty and security of the person"—the report would not violate section 7. Similar reasoning was used in *Robinson v. B.C. (Govt.)*,[331] where a provincial inquiry into police misconduct was challenged on both division of powers and Charter grounds.[332] Legg J. concluded as follows:[333]

> I agree with counsel for the Attorney General that the commission of inquiry appointed by the Order in Council is a recommendatory not an adjudicative body. It will report findings to the Lieutenant Governor in Council. It will make no determinations as to guilt or innocence or civil or criminal liability. It cannot terminate the employment or otherwise discipline any person. Nor will its report necessarily lead to any subsequent proceedings against anyone. That being so, it cannot be said that the inquiry will deprive any person of liberty or security of the person.

This approach, which has its roots in the distinction, discussed in chapter 2, between administrative and quasi-judicial functions, was also adopted by Mme. Justice L'Heureux-Dubé in her dissent in *Starr v. Houlden*.[334]

Lower courts have also been reluctant to expand the self-incrimination protections of the Charter beyond those in sections 11(*c*) and 13. Since the Supreme Court of Canada's decision in *R. v. Wigglesworth*,[335] it is clear that a person who is compelled to testify at a public inquiry is not a person "charged with an offence" for the purposes of section 11 of the Charter and, accordingly, does not have the right under section 11(*c*) "not to be compelled to be a witness in proceedings against that person in respect of the offence". Although the mere fact that a person has been compelled to testify at a public inquiry would not violate her section 11 rights, the applicability of section 11(*c*) is less clear where

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330 Unreported (June 28, 1983, Ont. Div. Ct.), summarized in 20 A.C.W.S. (2d) 334.

331 (1986), 3 B.C.L.R. (2d) 77, [1986] 4 W.W.R. 729 (B.C.S.C.), aff'd 28 B.C.L.R. (2d) 343, 36 D.L.R. (4th) 308 (C.A.), aff'd [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527 (subsequent references are to 3 B.C.L.R. (2d)).

332 The division of powers issue was resolved by the Supreme Court of Canada in *O'Hara v. British Columbia*, *supra*, note 17.

333 *Robinson v. B.C. (Govt.)*, *supra*, note 331, at 95.

334 *Supra*, note 1.

335 [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235.

it is sought to compel a person already charged with an offence to testify at an inquiry. Obviously, in that situation, the person would be a "person charged with an offence"; the question would be whether the inquiry is a "proceeding against that person in respect of the offence". On the one hand, it might be argued that, because of its recommendatory and broad public interest character, the inquiry is neither a proceeding in respect of the offence nor a proceeding against that person. On the other hand, if the offence is within the subject matter of the inquiry, it could be argued that the inquiry is indeed a proceeding contemplated by a broad and purposive reading of the protection in section 11(*c*).

The courts that have interpreted the interplay between sections 13,[336] 11(*c*) and 7 of the Charter have stressed the primacy of the more specific sections. In *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.*,[337] the British Columbia Court of Appeal held that section 11(*c*) extended the right to refuse to answer questions only to those accused in criminal trials, and that, with regard to witnesses compelled to testify outside the context of the criminal trial, the immunity against subsequent use of that testimony contemplated in section 13 was sufficient. It was stated as follows:[338]

> The common law right was a right not to testify if the answers might tend to incriminate the witness. Canadian law has recognized *the right of an accused* not to testify, and that right has been enshrined in s. 11(*c*) of the Charter. Canadian law has recognized *the right of a witness* not to be incriminated by evidence he has been compelled to give in another proceeding.... Section 13 of the Charter has given that protection constitutional status. But neither Canadian law nor the Charter has recognized the right of such a witness not to testify....
>
> Those who framed the Charter, unlike those who drafted the Fifth Amendment to the United States Constitution, have not expressly adopted, as a principle, that "no person shall be compelled in any criminal case to be a witness against himself". Rather they have deliberately drawn a line between non-compellability in the case of an accused, and compellability (with protection against use of incriminating evidence) in the case of a witness.

Thus, section 7 of the Charter did not give those compelled to testify before an inquiry the right to refuse to testify.

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336 Reproduced *supra*, this ch., sec. 2(c).

337 (1985), 68 B.C.L.R. 145, 24 D.L.R. (4th) 724 (C.A.), leave to appeal (1986), 68 N.R. 319n (S.C.C.) (subsequent references are to 24 D.L.R. (4th)).

338 *Ibid.*, at 747-48 (emphasis in original).

A similar approach was taken in *Robinson v. B.C. (Govt.)*,[339] where it was accepted that section 13 set out the self-incrimination protections definitively as applying only to the subsequent use of compelled testimony and not the compulsion itself. Legg J. stated:[340]

> I agree with the submission of counsel for the Attorney General that the effect of these cases is that any testimony the petitioners may be obliged to give before the inquiry could not be introduced in subsequent criminal or disciplinary proceedings against them. This protection, which can only be raised in the context of such subsequent proceedings, cannot afford a basis for challenging the obligation to give evidence before the inquiry. If anything s.13 of the Charter ensures that the inquiry cannot have prejudicial effects on the petitioners as they allege.

Implicit in this view is the assumption that the protection against use of testimony compelled at a public inquiry in subsequent proceedings protects the individual's interests adequately.

The conclusion that section 7 of the Charter provided no residual self-incrimination rights beyond the guarantee in section 11(*c*) against compulsion at a criminal trial, and the guarantee in section 13 against use of compelled testimony in subsequent proceedings, was re-affirmed reluctantly in the recent decision of *Lizotte v. Gagnon*.[341] In that case a person summoned to testify before an inquiry objected to testifying, not on the basis that his testimony would be used against him in subsequent criminal proceedings (he conceded that this was prohibited by section 13 of the Charter), but rather on the basis "that criminal proceedings against him will be based on facts arising from his testimony and that those facts might be used in future proceedings".[342] On the basis of the pre-Charter case of *Rothman v. The Queen*,[343] Hannan J. decided that there was no common law right to be silent and refuse to testify in the face of a summons. From this the judge concluded that no such right could be found under section 7 of the Charter. The judge did note that in certain "rare cases" a summons to testify before a public inquiry could be stayed temporarily on the basis that it would abuse the process of ongoing criminal proceedings.[344] In this

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339 *Supra*, note 331.

340 *Ibid.*, at 97.

341 (1990), 69 D.L.R. (4th) 482 (Que. S.C.), leave to appeal dismissed 116 N.R. 157*n* (S.C.C.).

342 *Ibid.*, at 485.

343 [1981] 1 S.C.R. 640, 121 D.L.R. (3d) 578.

344 *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.*, *supra*, note 337, at 748; *Petroles Esso Canada v. Enterprises Richard Chaput Inc.* [1988] R.J.Q. 1388 (Que. S.C.); and *Saccomanno v. Swanson* (1987), 49 Alta. L.R. (2d) 327, 34 D.L.R. (4th) 462 (Q.B.).

case, however, the witness had not yet been charged. The judge conceded that the witness "faces an unavoidable nightmare" and will run the following risk of prejudice:[345]

> The earlier hearing might be used as a "fishing expedition" to subject the witness to extensive questioning with a view to uncovering possible criminal conduct. The questioning might also be used to investigate a particular offence. For example, the accused might be required to reveal possible defences, the names of potential defence witnesses and other evidence. Moreover, the publicity generated by the hearing may seriously prejudice the likelihood of a fair trial.
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> The problem is that the initial hearing is likely to have none of the protections guaranteed by the criminal process. There will be no specific accusation, no presumption of innocence, no protections against prejudicial publicity, no rules of evidence and so on. It is submitted that there is a serious crisis of integrity in a criminal process whose detailed protections may so easily be ignored.

Despite identifying these prejudices, the judge concluded that there was no basis in section 7 of the Charter to allow the witness a lawful excuse not to testify.

Unfortunately, the above case was decided shortly before the release of the decision in *R. v. Hebert*,[346] which recognizes that, at least when a person is arrested and detained, he has a right to silence under section 7 of the Charter.

In *R. v. Hebert*, the accused was arrested and cautioned as to his right to counsel. He exercised this right, and received advice as to his right to refuse to give any statement to the police. In reply to questions, the accused stated clearly that he did not wish to make any statement. He was then placed in a cell where a police officer, disguised in plain clothes, engaged him in a conversation in which he made incriminating statements. The Supreme Court of Canada unanimously excluded the statement on the ground that it had been obtained in violation of the accused's right to silence and that its admission would bring the administration of justice into disrepute.

This decision clearly recognizes the existence of a right to silence. McLachlin J. derived this right from the confession rules, concluding that the underlying principle is the right of an accused person to decide whether to speak

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345 *Lizotte v. Gagnon*, *supra*, note 341, at 488-89, quoting Ratushny, "The Role of the Accused in the Criminal Process", in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms[:] Commentary* (1982) 335, at 364-65.

346 [1990] 2 S.C.R. 151, [1990] 5 W.W.R. 1.

or remain silent, as well as a concern for the integrity of the justice system. Sopinka J. agreed with this general approach. In his view, the right to remain silent arises whenever the coercive power of the state is brought against an individual, by arrest or accusation. Any waiver of this right must pass the test of awareness of the consequences and the deliberate deception of using an undercover police officer prevented the accused from being so aware. To this, Wilson J. added that the right to silence may well arise at some stage prior to detention and extend to a police interrogation of the suspect.

In a public inquiry, however, a person compelled to testify will generally not be under arrest or accused of a crime,[347] and will not usually be detained in custody. Moreover such a person will be aware of the circumstances and the consequences of testifying. Thus, it is not clear whether the courts will apply the reasoning in *R. v. Hebert* in the public inquiry context.

We should also note the case of *Thomson Newspapers Ltd. v. Canada*.[348] The vice-chairman of the Restrictive Trade Practices Commission, as it then was, had the power, under section 17 of the then *Combines Investigation Act*,[349] to order persons to appear before the commission to be examined under oath and to produce documents for examination by the commission. Such an order was served on the individual appellants, who were officers of a corporation, in connection with an investigation to determine whether the corporation was guilty of predatory pricing. The issues before the court were two-fold: (1) whether the order to give oral testimony was contrary to section 7 of the Charter; and (2) whether the order to produce documents was contrary to either section 7 or section 8 of the Charter. At this point, we will deal with the first issue only.

Wilson and Sopinka JJ. held that the order to compel oral testimony violated section 7 of the Charter and could not be saved by section 1. La Forest and L'Heureux-Dubé JJ. held that such an order did not violate section 7. Lamer J. held that, properly, the issue was whether section 20 of the *Combines Investigation Act*, which compelled the person to answer,[350] violated the Charter, not whether section 17 of the Act, which required his attendance, did so. Therefore, he declined to decide whether section 17 of the *Combines Investigation Act* violated section 7 of the Charter.

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347 See the discussion *supra*, this sec., which suggests that ss. 7 and 11(*c*) might allow an accused person to refuse to testify at a public inquiry.

348 *Supra*, note 150.

349 R.S.C. 1970, c. C-23.

350 This section was the equivalent of section 5(1) of the *Canada Evidence Act*, *supra*, note 22.

According to Wilson J., the compelling of testimony from an individual that may be used to build a case against him in a subsequent prosecution violates the person's right to liberty and security within section 7 of the Charter because it impinges upon his physical integrity and reasonable expectation of privacy. The question, therefore, is whether this is done in accordance with the principles of fundamental justice. In her view, any meaningful privilege against self-incrimination must require that neither the testimony itself, nor any evidence derived from it, can be used against that person; otherwise the person is being conscripted against himself. This protection is lacking in section 17 of the Act, which therefore violates section 7 of the Charter. Moreover, while compelling individuals to appear before administrative tribunals might be a rational means of monitoring compliance with regulatory schemes, the section does not impair an individual's rights as little as possible, since there is no evidence to suggest that the legitimate objectives would be impaired by affording the individual protection against the use of derivative evidence.

Sopinka J., in a separate judgment, agreed that the right to remain silent protects an individual against the affront to dignity and privacy that would result if agencies were permitted to conscript suspects against themselves. The officer holding a hearing under section 17 of the *Combines Investigation Act* is in the position of a "policeman armed with a subpoena", and thus the section violates section 7. Moreover, for the reasons given by Wilson J., it could not be saved by section 1 of the Charter.

La Forest J. also held that ordering a person to appear to give evidence constitutes a deprivation of liberty and, therefore, must be justified as being in accordance with the principles of fundamental justice. In contrast to the judgments of Wilson and Sopinka JJ., he stated that if the individual were to have the right to refuse to answer, this would create a dangerous and unnecessary imbalance between the rights of the individual and the interests of the community in discovering the truth about predatory pricing practices. The prohibition against the use of such compelled testimony in subsequent proceedings protects people from being conscripted against themselves without unduly denying the investigator access to relevant information. It is only where the testimony itself is sought to be used that the individual can be said to have been conscripted against himself, since evidence derived from that testimony, by definition, must have existed independently of that testimony. LaForest J. did note, however, that there might be exceptional cases, for example, where the evidence is so inaccessible or concealed that it could only have been discovered by means of the compelled testimony, where it might be unfair or contrary to the principles of fundamental justice to allow the evidence to be used in the prosecution of the accused. However, this would be a matter for the trial judge to determine in the subsequent proceeding, on the basis of the particular facts in the case, so that any rule of complete immunity from derivative use of compelled testimony is not required to uphold the validity of section 17.

L'Heureux-Dubé J., agreeing that section 17 of the *Combines Investigation Act* did result in a deprivation of liberty, was also of the opinion that the issue was whether this deprivation was in accordance with the principles of fundamental justice. In her view, witnesses were called at a section 17 inquiry when there was no accused, no suspect, nor any one charged with an offence, which she equated with the position of commissions of inquiry. Section 13 of the Charter protects such witnesses against subsequent use of compelled testimony, but it does not affect the principle that evidence derived from such testimony is generally admissible, although this might not be the case in specific instances, which can be addressed by the trial judge. Section 17 strikes a fair balance between the interests of society and those of its citizens.

Of those judges who dealt with the issue, therefore, two decided that legislation compelling oral testimony without protection against the admissibility of evidence derived from that testimony violates section 7 of the Charter and two decided that it did not.[351] Thus, one position would require the expansion of present protections against the use of compelled evidence to the use of any evidence derived from such evidence. In contrast, the other position suggests that the present protection against the use of only the compelled testimony itself strikes the appropriate Charter balance between the individual and the state, although it is recognized that, in some cases, subsequently discovered evidence may be so closely related to the compelled testimony that both should be excluded.

Assuming that the protection against the use of compelled evidence extends to the use of derivative evidence, there remains a fundamental problem in defining "derivative evidence". There are four possible types of evidence that might be categorized as derivative : (1) evidence that could have been discovered only as a result of the testimony; (2) evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony; (3) evidence that would, or would probably, have been discovered even without the testimony; and (4) evidence that was discovered after the testimony was given, but independently of the testimony. These are problems that have concerned the Supreme Court of the United States in its retreat from the stark "fruit of the

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351 In *R. v. Devasagayam* (1991), 61 C.C.C. (3d) 404 (Ont. Ct., Gen. Div.), the issue was the compellability, as a witness for the Crown, of a person who had originally been charged jointly with the accused. New informations were subsequently sworn charging each accused separately, the Crown admitting that this was so that each accused could be compelled to testify at the other's trial. Apparently, for some reason, the original information was never formally withdrawn. Weiler J. held that in this situation the witness is clearly "an accused" even if not "the accused" and to compel him to testify would not only violate his right to remain silent but would also be a deprivation of liberty not in accordance with the principles of fundamental justice.

poison tree" doctrine.[352] Presumably, evidence is derivative if it could have been discovered only as a result of the testimony, and probably also if it was discovered as the result of the testimony. Similarly, it is not derivative if it was discovered independently of the testimony, even if the testimony preceded the discovery. Evidence that would have been discovered anyway, or that would probably have been discovered anyway, apart from the testimony, might not be classified as derivative evidence, but even if it were to be so classified, it might not be excluded since its admission in evidence in the subsequent proceedings would be unlikely to bring the administration of justice into disrepute.[353]

Definitional problems become even more formidable if the broader concept of what might be called "derivative information", as opposed to "derivative evidence", is considered. If, as a result of the testimony, information is discovered that assists the police in their investigation, but no attempt is made to introduce it into evidence in any subsequent proceedings, an evidentiary remedy or Charter exclusion remedy will provide no protection. If being compelled to testify and thereby disclose the existence of information—as opposed to evidence—is somehow unfair, or not in accordance with the principles of fundamental justice, a remedy must be available at the time of the compelled disclosure at the public inquiry, not at the time of the subsequent trial.

Any order to give oral testimony to a witness who is already accused of an offence and, less clearly, to a witness who is already suspected of an offence, might be held to violate that person's rights against self-incrimination under section 7 of the Charter, at least where the subject matter of the inquiry is related to the offence with which the witness is charged or of which he is suspected. The majority of the judges accept the view that it is the subpoena, or summons, itself that constitutes a deprivation of liberty, and it is not in accordance with the principles of fundamental justice to compel a person who is accused of an offence to speak when he chooses to remain silent. This is quite apart from the limited right of non-compellability guaranteed by section 11(*c*) of the Charter.

Where, in similar circumstances, the witness is not "charged" but is merely "suspected" of having committed the offence, there might be less justification for a blanket rule of non-compellability. However, this issue turns on the definition of the terms "charged" and "suspected". If "charged" means "in respect of whom an information has been laid", its meaning is relatively clear, but if it means "in

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352 *Silverthorne Lumber Co. Inc. v. United States*, 251 U.S. 385 (1920) (independent source exception); *Nardone v. United States*, 308 U.S. 338 (1939) (attenuation exception, evidence cannot be attributed to the wrongful act); *Nix v. United States*, 467 U.S. 431 (1984) (inevitable discovery exception); *Murray v. United States*, 108 S. Ct. 2529 (1988) (knowledge of the existence of the evidence from an independent source).

353 Compare *R. v. Black*, [1989] 2 S.C.R. 138, 93 N.S.R. (2d) 35.

respect of whom the prosecutorial power of the state has been set in motion", so as to include arrest, the issuance of appearance notices, and the like, it becomes somewhat less clear.

A person who is merely "suspected" of having committed an offence might range from someone who might be involved in a criminal activity of some unspecified nature, to a person in respect of whom there are reasonable and probable grounds to believe that the person is guilty of a specific offence, but against whom no proceedings have been taken and who has not yet been arrested. The closer one comes to the latter end of the spectrum, the more difficult it is to rationalize why such a person should be placed in a worse position than someone already charged with an offence. Of course if the purpose, or one of the purposes, of the inquiry is to determine whether that person, or any specific person, has committed an offence, then it would seem from *Starr v. Houlden*[354] that the inquiry would be *ultra vires* the province. However, this does not resolve the issue where the inquiry is validly within provincial jurisdiction.

In cases where an individual is a person under some investigation only, it would likely be a question of balance. On the one hand, there is the public interest involved in the very nature of all public inquiries; the public interest in having available all relevant facts to enable the inquiry to complete its task. On the other hand, there is the interest of the individual in being protected against the violation of any guaranteed right or, indeed, against the violation of any right that, even if not guaranteed, might be seen to outweigh that public interest.

(e) PROTECTION OF SECTIONS 7 AND 8 OF THE CHARTER WITH RESPECT TO COMPELLED PRODUCTION OF EVIDENCE

As we discussed previously,[355] there is some uncertainty about whether the protections against the subsequent use of compelled testimony under the Charter extend to the subsequent use of documents and other evidence that an individual is required to produce for a public inquiry. As a matter of principle, there would appear to be no rationale upon which to distinguish between testimony and other evidence for the purpose of the protection against self-incrimination. Obviously, a person might be incriminated equally by documents or other things and an oral statement. However, documents do differ from compelled oral statements in that the former are already in existence at the time of the compulsion and the witness is being required merely to produce them, whereas the latter are created in the course of the compulsion. It is not clear whether this distinction will narrow

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354 *Supra*, note 1.

355 *Supra*, this ch., sec. 2(b).

decisively the protection available to individuals compelled to produce documents or other evidence at a public inquiry.

The second part of *Thomson Newspapers Ltd. v. Canada*,[356] examined previously,[357] concerned the validity of the order to produce documents, which was attacked under both sections 7 and 8 of the Charter.[358] The section 7 argument was shortly dismissed, with only L'Heureux-Dubé J. dealing with it at length. She concluded that, since an order to produce documents does not result in the creation of new evidence, it does not violate any right to remain silent. She stated that "[t]he second branch of the privilege—immunity in respect of testimony—always remained concerned with oral evidence. The privilege never offered protection against the subsequent use of real evidence."[359]

As discussed previously,[360] however, there is some question as to the accuracy of the above statement. At common law, it would appear that a witness did have the right to refuse to produce documents on the ground that they incriminated him to the same extent as answers to questions.[361] If the provisions in the various Evidence Acts abolished this aspect of the common law right against self-incrimination, then the provisions against subsequent use should apply to such evidence as well as to testimony. This also supports a broader reading of section 13 of the Charter,[362] which would make it relevant to the subsequent use of documents produced at a public inquiry. Although the wording of section 13 makes no reference to compelled production of documents or other evidence, its purpose, coupled with the historical nature of the common law privilege, might justify such a broad reading. Alternatively, the same concern might be incorporated under section 7 of the Charter. On the other hand, it might be argued that section 13 does not protect against the subsequent use of documents because, unlike compelled testimony, the documents were not created under compulsion. In the leading case under section 24(2) of the Charter,[363] the

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356 *Supra*, note 150.

357 *Supra*, this ch., sec. 2(d).

358 Section 7 of the Charter is reproduced *supra*, this ch., sec. 2(d). Section 8 of the Charter provides: "Everyone has the right to be secure against unreasonable search or seizure."

359 *Thomson Newspapers Ltd. v. Canada*, *supra*, note 150, at 282.

360 *Supra*, this ch., sec. 2(b).

361 *Spokes v. The Grosvenor and West End Railway Terminus Hotel Co.*, *supra*, note 311.

362 Reproduced *supra*, this ch., sec. 2(c).

363 Section 24 of the Charter provides as follows:

> 24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by

court has suggested that the admission of pre-existing evidence, such as documents, does not affect the fairness of a subsequent trial.[364]

On the argument under section 8 of the Charter, La Forest J. held that an order to produce constituted a seizure within section 8. The question was whether the seizure was reasonable. He was of the view that, because the *Combines Investigation Act*[365] was regulatory in nature, a less strenuous and more flexible approach should be taken to the interpretation of section 8. Section 8 is directed to the citizen's right to privacy, and there is a relatively low expectation of privacy in respect of documents that are used or produced in the course of regulated business activities. This is quite different from searches or seizures made in the course of an investigation of criminal activities. The power to order the production of documents in the effective regulation of business activities is vitally important. Moroever, the investigatory nature of the regulatory scheme made it inappropriate to impose a requirement that there be reasonable and probable ground to believe that a crime was committed.

La Forest J. did hold, however, that there are limits to the power of a regulatory tribunal to compel the production of documents. He adopted a threefold requirement: (1) it must be shown that the documents are relevant; (2) the subpoena must contain adequate specificity; and (3) the documents requested must be only as broad as necessary for the purposes of the inquiry. La Forest J. was of the view that it would be unnecessary to have the determination of relevancy made before the subpoena is issued and that subsequent judicial review would be an adequate safeguard.

To a large extent, the *Public Inquiries Act*[366] provides these safeguards expressly. Section 7 of the Act[367] requires the commission to specify the documents and things it is sought to compel by summons. Moreover, section 7 requires that such documents and things must be "relevant to the subject-matter of the inquiry". The stated case procedure available under section 8 of the Act[368] would allow judicial review for a person contesting a summons. However, the *Public Inquiries Act* differs from the decision in *Thomson Newspapers Ltd. v.*

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this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

364 *R. v. Collins*, [1987] 1 S.C.R. 265, 13 B.C.L.R. (2d) 1.

365 *Supra*, note 349.

366 *Supra*, note 275.

367 Section 7(1) is reproduced *supra*, this ch., sec. 2(a).

368 See the discussion *supra*, ch. 2, sec. 4.

Canada,[369] to the extent that nothing in the Act requires that a commission require the production of only business or other documents or things over which a person has a diminished reasonable expectation of privacy. The only limit in the Act on what can be seized is relevance to the subject matter of the inquiry, and that alone might justify the production of many documents and things over which people have a high and reasonable expectation of privacy.

L'Heureux-Dubé J. agreed that the order in *Thomson Newspapers Ltd. v. Canada* constituted a seizure. In her view, section 8 of the Charter protects against unreasonable violation of the expectation of privacy, which implies the balancing of public interests in the enforcement of the *Combines Investigation Act*[370] with the privacy interest in the items to be produced. The mandatory production of documents was rationally connected to the Act's main purpose and was significantly less intrusive than other possible means. She drew an analogy between the investigative work challenged in that case and the work of a public inquiry, stating as follows:[371]

> Commissions of inquiry and other investigative agencies serve a useful purpose in our legal tradition.
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> ....
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> To require the Commission to resort to courts in order to obtain a warrant and, in so doing, to establish 'reasonable and probable grounds...to believe that an offence has been committed and that there is evidence to be found'...I venture to say, would only defeat the purpose of the Act which is to investigate allegations of wrongdoing and report its evidentiary findings.

Sopinka J. held that an order to produce under section 17 of the *Combines Investigation Act* was not a seizure within section 8 of the Charter. A mere demand that is not yet enforceable is a minimal intrusion. Once the demand is made, the applicant has the right to judicial review to establish its reasonableness and constitutionality, and it is only after such a determination that the order can be said to be a seizure; but by then, *ex hypothesi*, its validity will have been determined.

Wilson J. dissented, and would have held that the order did constitute a seizure, and that, since the director need have no reasonable and probable grounds before applying for an order, it constituted an unreasonable search. Furthermore, the fact that the applicant may seek judicial review, *ex post facto*, did not alter

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369 *Supra*, note 150.

370 *Supra*, note 349.

371 *Thomson Newspapers Ltd. v. Canada*, *supra*, note 150, at 288-89.

the original unreasonableness of the order. Nor could such an order be justified under section 1 of the Charter. Her conclusion was premised, however, on a finding that the *Combines Investigation Act* constituted a quasi-criminal scheme. The court would appear to require somewhat less in the way of safeguards for orders compelling production of documents in a regulatory context.

(f) THE CHARTER AND POWERS UNDER PART III OF THE *PUBLIC INQUIRIES ACT*

As discussed earlier in this report,[372] Part III of the *Public Inquiries Act*[373] contains some extraordinary and rarely used powers related to the search and seizure of evidence[374] and the apprehension and detention of persons summoned to testify before an inquiry.[375] Although these powers are extraordinary, it must be noted that they are closely related to the coercive powers contained in section 7 of the Act, applicable to all inquiries appointed under the Act. The Part III powers of search and seizure, and apprehension and detention, simply reveal the latent coercion behind a summons issued by a commission under section 7 of the Act, which requires that person testify under oath or produce documents or other things. The powers conferred under Part III of the Act are designed to apply when an individual does not comply voluntarily with the summons.

Section 16 of the Act provides for the issuance of a bench warrant to apprehend and detain in custody a person who has been served with a summons to appear before an inquiry, where the person has failed to attend to the inquiry, a sufficient sum for his fees and allowance has been paid or tendered, and such person's "presence is material to achievement of the purposes of the inquiry". That section empowers a judge to detain the witness in custody "until his or her presence as a witness before the inquiry is no longer required, or, in the discretion of the judge, to be released on a recognizance, with or without sureties, conditioned for appearance to give evidence".

This power of apprehension and detention does not appear to depart substantially from the relevant Charter standards. Apprehension and detention under section 16 of the Act would not be arbitrary, given the requirements for judicial authorization and the specific conditions precedent that must be satisfied. In the ordinary course of events, a person detained under this power would not be a person charged with an offence for the purpose of section 11(*e*) of the Charter, which provides that a person charged with an offence has the right "not to be

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372 *Supra*, ch. 2, sec. 7.

373 *Supra*, note 275.

374 *Ibid.*, s. 17.

375 *Ibid.*, s. 16.

denied reasonable bail without just cause". Nevertheless, it is likely that the concept of reasonable bail would be incorporated into either or both of sections 7 and 9 of the Charter.[376] It might be that simply granting the judge a discretion to release the person on a recognizance does not give adequate protection to the individual's interest in liberty. Nevertheless, the wording of section 16 of the Act seems flexible enough to import evolving Charter standards.

Section 17 of the *Public Inquiries Act*[377] provides that an application can be made to a judge showing "that there are reasonable grounds for believing that there are in any building, receptacle or place, including a dwelling house, any documents or things relevant to the subject-matter of the inquiry", and provides for the issuance of a warrant "to enter and search if necessary by force" and seize and remove relevant evidence and deliver it to the commission.

This search power does not depart substantially from the minimum constitutional requirements set out in *Hunter v. Southam Inc.*[378] It complies with the pre-authorization required by that case, although the criteria for the issuance of the warrant under the Act relate only to the existence of reasonable grounds for believing that there is relevant evidence in the place to be searched, as opposed to the existence of probable cause for believing that a crime has been committed. The court has recognized, however, that the standards established in *Hunter v. Southam Inc.* will adjust in different contexts and, in a recent case, concluded that a distinction should be drawn "between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review".[379]

It is not clear where public inquiries will be situated on this spectrum. On the one hand, public inquiries are not ordinarily a prelude to a criminal prosecution. Moreover, if they are used for that purpose, a provincial public inquiry would be vulnerable on the federalism grounds examined earlier in this chapter. On the other hand, public inquiries are distinct from regulatory schemes in that they are random and unusual events. Unlike the case with an ongoing regulatory scheme, individuals might very well develop a reasonable expectation of privacy, particularly if the search was of a dwelling house, as opposed to a regulated place of business.

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376 Section 7 of the Charter is reproduced *supra*, this ch., sec. 2(d). Section 9 of the Charter provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

377 *Supra*, note 275.

378 [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

379 *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at 647, 76 C.R. (3d) 283, at 301.

Despite the primacy of the probable cause standard in *Hunter v. Southam Inc.*,[380] it might be argued that it would be perverse to require that an inquiry establish reasonable and probable cause to believe that a crime has been committed when such a finding would force a provincial public inquiry close to the forbidden domain of supplementing a criminal investigation. In *Thomson Newspapers Ltd. v. Canada*,[381] the Supreme Court of Canada recognized that, in the context of a regulatory scheme, "[t]he power to subpoena books, records and documents is obviously...[an] investigatory mechanism. To limit its use to situations in which the Director or a commission member can show reasonable and probable grounds to believe that a *specific* offence has been committed would frustrate the process of investigation at its very inception."[382] The same might be said with respect to inquiries, which have an even more explicit investigatory function.

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380 *Supra*, note 378.

381 *Supra*, note 150.

382 *Ibid.*, at 234 (emphasis in original).

CHAPTER 4

THE CASE FOR REFORM

1. HISTORY OF CRITICISMS

The procedure governing public inquiries has been the subject of close scrutiny and intense debate from the time of the earliest commissions. To a large extent, this has been due to the admissibility at such inquiries of hearsay evidence, and the power of such inquiries to compel testimony, and the production of documents and other evidence, in contexts in which the participants might be exposed to criminal liability. In an exploration of due process and inquisitions, one commentator[1] has traced statutory and judicial authority from the fourteenth century to the effect that "no man is to be put to answer unless in the manner prescribed by law",[2] and has formulated a number of questions concerning the fundamental legal limitations on inquiry operations:[3]

> By what authority may the individual require that anything in the nature of a criminal charge laid against him be tried alone by a court of law? If a would-be criminal charge against him is about to be considered by an executive commission or tribunal of inquiry may the individual properly seek to have such an investigation stopped?

The foundations for these and related concerns have been present in the Canadian experience with commissions of inquiry since the original legislation of 1846, when the same power to compel evidence "as is vested in any Court of Law in civil cases" was conferred on commissioners.[4] Although little discussion

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1 Mummery, "Due Process and Inquisitions" (1987), 97 L.Q. Rev. 287, at 290.

2 *Cock v. The Attorney-General* (1909), 28 N.Z.L.R. 405, at 422-24 (C.A.).

3 *Mummery, supra*, note 1.

4 *An Act to empower Commissions for inquiring into matters connected with the public business, to take evidence on oath*, 1846, 9 Vict., c. XXXVIII (Prov. of Can.) reads, in part, as follows:

> [W]henever the Governor, Lieutenant Governor, or person administering the Government of this Province, acting by and with the advice of the Executive Council thereof, shall cause inquiry to be made into and concerning any matter connected with the good government of this Province, or the conduct of any part of the public business thereof, or the administration of justice therein, and such inquiry shall not be regulated by any special Act, it shall be lawful for the Governor, Lieutenant Governor, or person administering the government as aforesaid, by the Commission

took place when the legislation was re-enacted after Confederation, considerable controversy arose in connection with the 1880 statute, which provided more explicitly for departmental inquiries. Parliamentarians protested that "the powers to be bestowed by this Bill are inconsistent with the whole spirit of the British Constitution and the administration of justice" and that it was "contrary to our general dealings with criminal cases, to permit an enquiry to be entered upon or to proceed in an investigation when once we have touched a charge of crime".[5] Prime Minister Sir John A. Macdonald defended the measure, but offered assurances that there was no intention to transgress upon judicial authority. "If the evidence of crime or a felony be discovered," he emphasized, "there is only one thing to do—to send the offender to trial...if the head of any department has to make an inquiry as to any irregularity and a distinct case of felony appears, it can be reported for trial by the ordinary tribunals, by a recommendation of the prosecution of the offender".[6]

Although the process of creating inquiries in England differs from that in Ontario, the essential elements of the decision to appoint an inquiry, and the basic nature of the trade-off between individual interests, on the one hand, and the concern of the community with information, on the other, are similar. In connection with the passage of the *Tribunals of Inquiry (Evidence) Act, 1921*,[7] Lord Kilmuir explained the occasional need for inquiries and also set out the basic dilemma as he saw it:[8]

> One must frankly admit that there is a conflict between the needs of the state that the truth should be discovered on weighty matters which reflect on the functioning of its important agencies and the position of the individual who

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> to confer upon the Commissioners or persons by whom such inquiry is to be conducted, the power of summoning before them any party or witnesses, and of requiring them to give evidence on oath, orally or in writing, (or on solemn affirmation if they be parties entitled to affirm in civil matters,) and to produce such documents and things, as such Commissioners shall deem requisite to the full investigation of the matters into which they are appointed to examine, and the Commissioner shall then have the same power to enforce the attendance of such witness and to compel them to give evidence, as is vested in any Court of Law in civil cases; And any wilfully false statement made by any such witness on oath or solemn affirmation, shall be a misdemeanor punishable in the same manner as wilful and corrupt perjury: Provided always that, no such party or witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution.

5 Quoted in Law Reform Commission of Canada, *Commissions of Inquiry*, Working Paper 17 (1977) (hereinafter referred to as "L.R.C.C. Working Paper"), at 8.

6 Quoted in Sellar, "A Century of Commissions in Inquiry" (1947), 25 Can. B. Rev. 1, at 3.

7 11 & 12 Geo. 5, c. 7 (U.K.).

8 Quoted in Ont. Leg. Deb., 4th Sess., 28th Leg. (June 24, 1971), at 3176.

> finds himself involved. The vital point...is that the procedure should only be invoked for weighty and important matters for it is only then that the sacrifices on the part of the individual can be fairly demanded. That leaves our unending problem where the ordinary life of the ordinary citizen is invaded we must use all our skill and sympathy to ensure that this is done in the least fretful manner.

Whatever protection might be afforded by a threshold determination of "weighty and important" matters, as a condition to the establishment of a public inquiry, would be essentially unenforceable, particularly where only a few of the individuals that might be involved in any eventual inquiry are known at the outset.[9] Thus, concern about invading the ordinary life of the ordinary citizen is a recurring theme. The risks posed to the interests of participants has been described in the following terms:[10]

> The main individual rights affected by the exercise of investigatory powers are the right to privacy, the right to the enjoyment of one's property, the right to be left alone and the right to keep one's information and ideas to oneself. In other words, the freedom not to speak....
>
> These rights are not absolute. They may be interfered with or qualified but they are, nevertheless, the personal rights affected when power to investigate is given and they are contracted as investigatory power is expanded. They are rights and interests that are fundamental and should be safeguarded against any unjustified encroachment. Their protection requires vigilance.

Throughout much of the first half of the twentieth century, the tendency, on balance, was to uphold the authority of inquiries to perform their appointed tasks. Yet, even before the McRuer Report, reconsideration of the balance was stimulated by other events, notably two inquiries conducted by Supreme Court of Canada justices in the 1940s. Chief Justice Duff's Hong Kong inquiry,[11] and the investigation by Taschereau and Kellock JJ. into the Gouzenko affair—both initiated under the *War Measures Act*[12]—involved extensive *in camera*

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9 In arguing for a threshold test of "substantial public importance" as a condition to the establishment of investigatory commissions, the Law Reform Commission of Canada argued that the characterization is one that "can and should be publicly debated". However, the federal Commission observed subsequently that "[i]t is fair to say that, although one cannot anticipate all the questions that can reasonably be deemed to be of substantial public importance, 'one will know one when one sees one' ". See L.R.C.C. Working Paper, *supra*, note 5, at 31.

10 Ontario, *Royal Commission Inquiry into Civil Rights* (1968) (hereinafter referred to as "McRuer Report"), Vol. 1, at 386-87.

11 Hong Kong Royal Commission, 1942.

12 R.S.C. 1927, c. 206.

proceedings.[13] In combination with the arrests preceding its creation, the latter, appropriately described as a "secret royal commission", has been credited with galvanizing civil libertarians and contributing to the revitalization of the civil liberties movement in Canada.[14]

Another inquiry that received considerable attention was the inquiry conducted by former Justice Rand into the conduct of Leo Landreville. In the course of a subsequent legal challenge by Landreville to adverse findings made by the commission, Collier J. of the Federal Court, Trial Division stated as follows:[15]

> This was a somewhat unusual Royal Commission. The majority of Royal Commissions seem to be constituted to investigate a particular subject, thing or state of affairs. Rarely do they relate to one person. This Commission was, however, directed to the investigation of one particular person and his dealings with a certain company, its officers, or its shares. The Commissioner was requested to inquire into those dealings and to express an opinion whether, in the course of them, there had been misbehaviour by the plaintiff as a judge, or whether the plaintiff, by the dealings, had proved himself unfit. I am unable to see how those general terms indicated to the plaintiff there would, or might be, an allegation of gross contempt of certain tribunals, amounting to misconduct.

Counsel for the plaintiff in Landreville soon refined his concerns about the dangers of public inquiries for presentation to a wider audience.[16] The difficulties inherent in the present system, and the desired solution, were described as follows:[17]

> [I]t may well be that all commissions of inquiry should not be conducted in an atmosphere of publicity. The commission is institutionally inappropriate as a vehicle of publicity in the consideration of every social, cultural or economic problems, and perhaps has no place where the inquiry refers to the behaviour or conduct of a person. There are better and more efficient means of publicity than conducting a commission inquiry. Indeed, publicity of the degree that will be effective "to allay public concern" will transform an inquiry into a Roman holiday when the rights of those being investigated or called as witness can be

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13 For a discussion of the Hong Kong inquiry, see Williams, *Duff[:] A Life in the Law* (1984), especially at 222-39. With respect to the circumstances of the Gouzenko proceedings, see Creighton, *The Forked Road: Canada 1939-1957* (1976), at 109-13.

14 Kaplan, *State and Salvation[:] The Jehovah's Witnesses and Their Fight for Civil Rights* (1989), at 257.

15 *Landreville v. The Queen*, [1977] 2 F.C. 726, at 757, 75 D.L.R. (3d) 380, at 404 (T.D.).

16 Henderson "Abuse of Power by Royal Commissions", in *Special Lectures of the Law Society of Upper Canada 1979[:] The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (1979) 493.

17 *Ibid.*, at 518-19.

> overlooked. The rights of persons must carry more weight than any such concern.... Perhaps, as a rule confidentiality should be observed in commission proceedings, and only exceptionally, on grounds of strong public interest, should admission of the press and the public be permitted.

Other inquiry counsel, having represented the interests of individuals whose lives were seriously disrupted during the course of inquiry proceedings, later joined the ranks of critics to campaign for various reforms intended to limit the use of inquiries or to control their powers. For example, Mr. Justice Sopinka argued that the constitutional division of powers is only one of the limitations relevant to the legitimacy of inquiries:[18]

> [C]oncern for the individual is the additional principle which must be called on to determine the acceptability of specific inquiries. And, more generally, this concern is the bedrock principle which must be employed to guide the conduct of all public inquiries. Thus, underlying the decision in the Starr case is a more fundamental principle than the simple division of powers between the federal and provincial governments: when an individual is subjected to investigation and possible punishment by the state, then as a matter of necessity we must ensure that her rights are protected. Only this vigilance can ensure that innocent individuals are not unjustly accused and convicted, and that the guilty receive appropriate sanction.

The importance to the reform effort of portraying inquiry proceedings as adversarial in nature cannot be over-emphasized. In particular, inquiry proceedings are depicted as pitting the coercive authority of the state against the individual who might be deprived of basic protections against self-incrimination or exposed to the risk of unwarranted public condemnation. This portrayal of the circumstances of the inquiry is intended to place the proceeding on the defensive, and it does so effectively due to the powerful reflex to resort to the adversarial and adjudicative norm of the criminal prosecution.

The inquiry process stands in an ambiguous relationship with the legal process.[19] The inquisitorial origins of the process suggests that an inquiry should proceed with the commissioner being given unrestricted power to uncover, explore, and present evidence. Such procedures might be the most appropriate for determining accuracy and truth.[20] On the other hand, it is a rare occurrence for an inquiry to be concerned solely with conflicts concerning the facts and the event. Often the inquiry triggers a conflict among the affected interests and, accordingly,

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18 Sopinka, *Public Inquiries*, address to the Canadian Institute for the Administration of Justice Conference, Winnipeg (August 24, 1990), at 2.

19 Salter, "The Two Contradictions in Public Inquiries", in Pross, Christie, and Yogis (eds.), *Commissions of Inquiry* (1990) 173.

20 Thibaut and Walker, "A Theory of Procedure" (1978), 66 Cal. L. Rev. 541.

tends to produce an adversarial court-like process. When a conflict of interests is present, it is important to ensure that the interests of affected parties are protected adequately, and that the search for truth does not become a prosecution in disguise.

Certain aspects of the present perception of the inquiry in the adjudicative tradition have been described in the following terms:[21]

> [A]djudicative values tend to be treated as conditions that cannot be violated by public actors or decision-makers, although parties can waive protections created to safeguard their interests. Positions would change if legal requirements and values were considered either to support interests larger than those of individuals or to imply proactive roles for actors and decision-makers in the structuring of their processes.... Adjudicative values tend to imply a rather passive role for a neutral arbiter, greater control of the process by the parties than by the third party arbiter and a tactical presentation of the facts by the parties.

With their inquisitorial features, inquiries obviously depart from the adjudicative ideal. Like criminal prosecutions, they are initiated by the state, but unlike such prosecutions, affected parties can be compelled to testify and have only limited procedural rights in the proceedings.

In an earlier era this question was less contested than today. The 1846 inquiries legislation simply asserted the necessity of occasional inquiries into the good government of the jurisdiction and asserted that "the power of procuring evidence under oath in such cases would greatly tend to the public advantage as well as to afford protection to Her Majesty's subjects from false and malicious testimony or representations".[22] In part, this was related to the fact that there was less concern about an individual's rights; on the other hand, the criminal law of that time was not as pervasive as it is at present. Today more attention must be given to the purposes of the inquiry, the nature of the powers sought to be exercised, and the availability of alternative means of accomplishing the same objectives.

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21 Robardet, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?", in Pross, Christie, and Yogis, *supra*, note 19, at 128.

22 *An Act to empower Commissions for inquiring into matters connected with the public business, to take evidence on oath*, *supra*, note 4.

2. THE CLASSIFICATION OF PUBLIC INQUIRIES

General classification schemes for public inquiries abound. One scheme divides inquiries into two categories based on procedure or methodologies, distinguishing between the research inquiry and the inquiry as arbitration.[23] Another classification scheme emphasizes functional objectives, differentiating between the determination of public policy, the review of political judgment, and the determination of guilt or innocence.[24] A third classification system contrasts investigative and advisory commissions.[25] It has also been suggested that the inquiry process is a policy outcome in its own right.[26] While there are thus numerous advocates of various classification schemes, there are also numerous sceptics who, for a variety of reasons, consider the typologies deeply flawed or, at best, unreliable guides to the classification of inquiries. In their view, public inquiries constitute a set of institutions characterized primarily by their *ad hoc* nature and diversity.

Beginning with a sampling of general definitions and descriptions, this section considers some of the principal classification schemes and reactions to them, particularly the proposed distinction between advisory and investigative inquiries.

For some, the inquiry may be described by reference to a range of purposes that, to a large extent, corresponds to the list of inquiry functions discussed earlier in this report.[27] Thus, for example, it has been suggested that:[28]

> [A]ll public inquiries offer to politicians the opportunity to demonstrate concern about a policy issue and to indicate that action is being taken upon it, while deferring the need to expend substantial resources in response to a perceived policy concern; to obtain advice, while maintaining some distance from the source of that advice, so as to be able to reject it where necessary; to generate, analyse, and exchange information, while informing and persuading the public of the merits of certain points of view; and to assess the public's tastes for proposed policy initiatives.

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23 Salter and Slaco, *Public Inquiries in Canada* (1981).

24 Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Ziegel (ed.), *Law and Social Change* (1973) 79.

25 Law Reform Commission of Canada, *Advisory and Investigatory Commissions*, Report 13 (1979) (hereinafter referred to as "L.R.C.C. Report").

26 Trebilcock, Hartle, Prichard and Dewees, *The Choice of Governing Instrument*, study prepared for the Economic Council of Canada (1982).

27 See Hodgetts, "Should Canada Be De-Commissioned?[:] A Commoner's View of Royal Commissions" (1964), 70 Queen's Q. 475, at 480, discussed *supra*, ch. 1, sec. 3.

28 Trebilcock, Hartle, Prichard and Dewees, *supra*, note 26, at 44.

It has been observed that, at the most general level, an inquiry is "any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations".[29] In the same vein, but perhaps with more hopeful expectations, commissions of inquiry have been described as bodies "to which appeal can be made for a definitive determination of controversial facts and for a trustworthy judgment on a complex public problem".[30]

Seeking to emphasize legal considerations, one commentator has suggested that "[i]n essence, the inquiry is a *sui generis* government instrumentality, which possesses the following basic characteristics: its processes are public, its creation is *ad hoc*, and its legal objective is an investigative/advisory report rather than a definitive decision".[31] Another observes that the definition of a royal commission "is not at all clear", and similarly places considerable stress on an institutional feature of an inquiry, that is, its independence:[32]

> They are a unique institution onto themselves with no formal ties to the government that established them. They do not fall within any one of the traditional divisions of government—Parliament, the executive or the courts—but instead perform functions that cannot effectively be done by any of the other three. As an investigative body, therefore, a Royal Commission established to inquire into either the business of a particular department or the conduct of a particular individual associated with the government, has the ability to remain impartial in the execution of its investigative duties and in the reporting of its findings.

Independence is indeed an important contributor to the effectiveness of inquiries, a fact that should be emphasized in light of the negative conclusions that are often associated with the suggestion that one purpose of such institutions is to enable final action to be postponed. It has been suggested that the independence of public inquiries confers the following "special benefits":[33]

> They can take a fresh look at problems, try to influence actors in other parts of the political system, and attempt to formulate a consensus on controversial issues that will command public acceptance. They are thus, despite their

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29 Salter, *supra*, note 19, at 175.

30 Hanser, *Guide to Decision: The Royal Commission* (1965), at 220.

31 Macdonald, "The Commission of Inquiry in the Perspective of Administrative Law" (1980), 18 Alta. L. Rev. 366, at 369.

32 Greenspan, "The Royal Commission: History, Powers and Functions and the Role of Counsel", in Moskoff (ed.), *Administrative Tribunals[:] A Practice Handbook for Legal Counsel* (1989) 327, at 331.

33 Bulmer, "Introduction: Commissions as Instruments for Policy Research" (1983), 26 Am. Behavioural Scientist 559, at 560.

prestige and authority, a means of potential innovation and change in policymaking.

Such observations are particularly important given the current scepticism about the effectiveness and integrity of ordinary government processes. A commission's independence from the elected government can help make it a credible policy instrument.

Beyond the above preliminary descriptions, which serve more to distinguish inquiries in general than to distinguish one inquiry from another, lie a variety of classification schemes. These offer sub-categories of inquiries that might be helpful, in varying degrees, to different inquiry users, from lawyers to librarians.

(a) SUBJECT MATTER

One four part subject matter scheme divided royal commissions into (a) inquiries into unexpected major disasters or disturbances, including inquiries into crises affecting a ministry of government; (b) inquiries into situations of social or cultural conflict; (c) inquiries to examine aspects of the economy; and (d) investigations of the public service, charges against departmental officials, or other governmental irregularities.[34] One could equally imagine a subject matter classification scheme oriented around such headings as transportation, education, health, resources, policing, or agriculture, but how or why this might be useful bears further reflection.

One possible application of the subject matter classification of inquiries might be by counsel for an inquiry participant who wishes to forestall the inquiry's examination of her client's conduct and affairs. This might be accomplished by attempting to demonstrate that the client's actions fall outside the scope of the subject matter assigned to the inquiry; that the subject matter of the inquiry is not within the constitutional jurisdiction of the government that established it; or that the subject matter is criminal in nature, and is therefore something that should be investigated through alternative procedures. As we discussed earlier in this report,[35] all of the difficulties associated with the classification of governmental activities in relation to the division of powers might arise. It should be noted, however, that a precedent does exist for a joint federal-provincial inquiry resulting from the amalgamation of separate royal

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34 Hodgetts, "The Role of Royal Commissions in Canadian Government", in *1951 Proceedings of the Third Annual Conference of the Institute of Public Administration of Canada* (1951) 351, at 354-55.

35 *Supra*, ch. 3, sec. 1.

commissions contemplated by the federal government and the government of Newfoundland in the aftermath of the 1982 Ocean Ranger drilling rig disaster.[36]

It might also be relevant to consider whether an inquiry deals with the conduct of public officials, as opposed to private individuals, since this distinction appears to influence the willingness of courts to permit inquiries to proceed.[37] Of course, the classification of inquiries according to subject matter along these lines raises a potential controversy with respect to the determination of what is "private", and what is "public".[38] Nevertheless, such a classification might be relevant in determining the extent and reasonableness of an inquiry examining the affairs of specific individuals.

Some commentators have also indicated that subject matters involving ethical decisions or competing interests might be inappropriate for consideration by inquiries, at least those inquiries whose proceedings are adversarial in nature. It has been suggested, for example, as follows:[39]

> A commission of inquiry will be less helpful in resolving an issue involving ethical or value choices. Neutrality lends little authority for the making of choices that clearly depend primarily on values. A Parliamentary committee, or in an extreme case, even a free vote in Parliament, will be of far greater utility and hence be far more effective in making such a choice.

Similarly, it has been suggested that "when polycentricity and value prioritization are involved, the appropriateness of an adversarial, adjudicative model is called into question".[40] Despite these cautions, there have been numerous commissions, throughout Canadian history, that have dealt with value choices and polycentric problems. In Ontario, for example, the Royal Commission of Inquiry into the Confidentiality of Health Information[41] dealt with the value of privacy, and the Royal Commission on Electric Power Planning[42] dealt with a polycentric issue, requiring the repeated expansion of its

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36 For discussion of the administration of this unique inquiry, see Grenville, "The Role of the Commission Secretary", in Pross, Christie, and Yogis, *supra*, note 19, 51.

37 *Starr v. Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R.(4th) 641.

38 Horwitz, "The History of the Public/Private Distinction" (1982), 130 U. Penn. L. Rev. 1423.

39 Iacobucci, "Commissions of Inquiry and Public Policy in Canada" in Pross, Christie, and Yogis, *supra*, note 19, 21, at 25.

40 Robardet, *supra*, note 21, at 129.

41 See Ontario, *Report of the Royal Commission of Inquiry into the Confidentiality of Health Information* (1980).

42 See Ontario, Royal Commission on Electric Power Planning, *Shaping the Future[:] The First Report by the Royal Commission on Electric Power Planning* (1976); *A Race Against Time[:] Interim Report on Nuclear Power in Ontario* (1978); *Report on the Need*

terms of reference, in order to comprehend new aspects of the problem, such as the use of nuclear energy.

A final cautionary note emerges from the practical attempt to apply subject matter classifications to a number of British inquiries. "It is hardly surprising," one author concluded wryly, "that the largest category in the Appendix is headed 'Miscellaneous' ".[43]

(b) CLASSIFICATION BY ORIGIN AND COMPOSITION

Apart from the origin of public inquiries as federal or provincial creations, it has been suggested that it is important to know how inquiries are created, and who is appointed to conduct the inquiry.

It would appear that less emphasis is now given to terminology, and to formal and technical distinctions between royal commissions and other forms of public inquiry. However, it has been observed as follows:[44]

> [F]rom a legal point of view, it is apparent that these various terms reflect important differences in the source of an *ad hoc* inquiry's jurisdiction: Royal Commissions are established through the exercise of the Crown Prerogative; Public Inquiries are creatures of legislation or, exceptionally, delegated legislation; Investigations tend to result from the informal exercise of a Minister's power to manage his department, although federally they may in certain cases derive their power from statutory authority under the Inquiries Act. Despite these differences (which may marginally affect the reviewability of an Inquiry on some grounds), all the above-mentioned *ad hoc* institutions perform, to a large degree, the same investigatory and recommendatory function....

Whatever their names, the composition of these institutions continues to attract attention and comment. Three broad categories might be suggested to classify public inquiries according to their composition: representative inquiries, expert inquiries, and impartial inquiries.

A representative inquiry would draw upon relevant constituencies for its membership, with a view to enhancing the acceptability of the proceedings, and its findings and conclusions, among those whose interests are affected. Early in

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for Additional Bulk Power Facilities in Southwestern Ontario (1979); *Report on the Need for Additional Bulk Power Facilities in Eastern Ontario* (1979); *Report of the Royal Commission on Electric Power Planning [Final Report]* (1980).

43 Rhodes, *Committees of Inquiry* (1975), at 43.

44 Macdonald, *supra*, note 31, at 368-69.

the century, the Committee on Procedure of Royal Commissions assessed the representational approach to constituting an inquiry as follows:[45]

> It seems to us impossible to avoid the conclusion that appointments have sometimes been made to Commissions of individuals whose proper place would rather have been in the witness box than on the tribunal. A Commission selected on the principle of representing various interests starts with a serious handicap against the probability of harmony in its work, and perhaps even of practical results from its labours.

Today, however, we would expect greater support for the proposition that representativeness in the composition of inquiries might be appropriate. This view corresponds with the greater prominence of diversity issues generally, and the increase in experience in international and tripartite adjudication. Indeed, in some contexts, inquiries might be preferred over regular government processes precisely because their composition can be structured to represent the affected interests.

The appointment to inquiries of individuals who bring personal knowledge and expertise in relation to the substantive issues raised by the terms of reference is less common. As an alternative to the appointment of experts, expertise might be incorporated into the operations of an inquiry through the use of a research program, or the appointment of technical advisors to assist the commissioners or work with commission counsel. The rationale for expert appointments is the claim to legitimacy that specialists offer in speaking about the subject matter with which they are most familiar. The rationale presumes, of course, that the nature of the required expertise is understood properly at the outset. An analysis of the United States Presidential Commission on the Accident at Three Mile Island suggests that this initial determination will not always be made reliably.[46] Even where the relevant field of expertise can be identified, uncertainty or disagreement within the community of experts is often one of the central foci of the inquiry, and the direct involvement of potentially "partisan" specialists might be considered inappropriate. Moreover, the means of resolving controversy might differ, ultimately, from professional practice within the field of expertise.[47]

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45 United Kingdom, *Report of the Committee on Procedure of Royal Commissions* (Cd. 5235, 1910) (referred to as the "Balfour Committee Report"), at 6, quoted in Sellar, *supra*, note 6, at 9.

46 Dynes, "The Presidential Commission on the Accident at Three Mile Island" (1983), 26 Am. Behavioural Scientist 607.

47 This question is discussed in Salter, "Observations on the Politics of Assessment: The Captan Case" (1985), 11 Can. Pub. Pol'y 64.

The impartial commissioner contributes a degree of independence to the inquiry process that is itself a form of legitimacy. The findings of a disinterested inquirer are thought to gain strength from the relative objectivity of a neutral figure. When, as is so often the case, the commissioner brings legal or judicial experience to the inquiry, the process itself might claim trial-like advantages. This will appeal to those who view inquiries as properly adversarial in nature. It will appeal somewhat less to those who believe that at least some inquiries should proceed on different assumptions. It is also appropriate, at this point, to note the view that impartiality is to be found in the eye of the beholder. It has been suggested that, "when we are told that a particular person has been appointed to a Royal Commission...on the ground that he is or claims to be an 'impartial party', we may rest assured that this means merely that the selector and the selected agree in their bias".[48] Irrespective of the validity of this statement, the existence of this kind of impression about the nature of the selection process for commissioners has made some analysts highly critical of the use of judges in inquiries.[49]

(c) FUNCTIONAL CLASSIFICATIONS

Several schemes of classification for inquiries have been suggested that distinguish between identifiable functions. One commentator, for example, distinguished between "two broad classes of inquiry: the inquiry to recommend legislative policy, and the inquiry to investigate conduct".[50] Similarly, another author suggested "two major categories of commissions of inquiry". One category consists of "those of a generally quasi-judicial character which are responsible for examining the conduct of public officer or of a given sector of the central or decentralized administration". In the second category are inquiries that "allow the government to obtain the views of the population and of interested groups on a question of administrative, economic or social policy or in a comprehensive field of the State's activities".[51]

The most fully elaborated Canadian version of this functional classification scheme was that formulated by the Law Reform Commission of Canada (the "L.R.C.C.") as the basis for proposed changes to legislation and procedure

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48 Webb and Webb, *Methods of Social Study* (1932) at 24, quoted in Bulmer, "Introduction", in Bulmer (ed.), *Social Research and Royal Commissions* (1980), at 3.

49 Holland, "Judicial Activism and Judicial Independence: Implications of the Charter of Rights and Freedoms for the Reference Procedure and Judicial Service on Commissions of Inquiry" (1990), 5 Can. J.L. & Society 95, at 100-03.

50 Le Dain, *supra*, note 24, at 79.

51 Dussault and Borgeat, *Administrative Law[:] A Treatise* (2d ed., 1985), Vol. 1, at 75-76.

concerning inquiry operations.[52] In a study carried out within the context of its administrative law research program, the L.R.C.C. identified advising and investigating as the two basic functions that commissions of inquiry might serve.[53] While acknowledging that many inquiries exercise both functions, the federal Commission concluded that "almost every inquiry primarily either advises or investigates".[54] It expressed the view that an "essential distinction" existed between the two types of inquiry, and that a system of appropriate procedures for each could be derived from the distinction.[55]

Advisory commissions, according to the L.R.C.C., "address themselves to a broad issue of policy and gather information relevant to that issue".[56] The role they perform is basically one of supplementing the work of the Legislature and the executive which they do "by bringing to bear the resources of time, objectivity, expertise, and by offering another forum for the expression of public opinion".[57] By contrast, the investigative commission directs its attention to "the facts of a particular alleged problem, generally a problem associated with the functioning of government".[58] Again, their work supplements the efforts of other institutions including the Legislature, executive, judiciary and the police to perform investigative functions that, for a variety of reasons, cannot be carried out fully satisfactorily by those institutions. The L.R.C.C. summarized the position of investigatory commissions in the following terms:[59]

> Investigatory commissions supplement the activities of the mainstream institutions of government. They may investigate government itself, a function that must clearly fall to some body outside the executive and public service. They possess an objectivity and freedom from time constraints not often found in the legislature. They can deal with questions that do not require the application of substantive law by the courts. And they can reasonably investigate and interpret matters not wholly within the competence of Canada's various police forces.

Some have accepted the L.R.C.C.'s classification scheme.[60] One commentator has advanced a fundamental epistemological distinction between advisory and investigatory activity that supports the distinction made by the

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52 See L.R.C.C. Report, *supra*, note 25.

53 L.R.C.C. Working Paper, *supra*, note 5, at 13.

54 *Ibid.*

55 *Ibid.*, at 23.

56 *Ibid.*, at 13.

57 *Ibid.*, at 16.

58 *Ibid.*, at 13.

59 *Ibid.*, at 19-20.

60 See, for example, Greenspan, *supra*, note 32.

federal Commission. The advisory function resembles scientific experiments; "the principle that truth is something obtainable through observation and measurement lies" at their heart. On the other hand, the concept of investigation is founded on the belief that "truth is something which is revealed in free and open debate between opposing interests.... The epitome of the [investigative commission] is the court of law...the principle of truth winning out in free and open debate is central."[61]

Much of the utility of the distinction between advisory and investigative functions has to do with its institutional and procedural implications. It has been observed that if "the purpose of inquiries is to seek truth, then there is certainly a case to be made that adjudication, which seeks only to produce outcomes satisfactory to the parties as opposed to seeking 'rational' decisions..., has a character which is inappropriate for most inquiries".[62]

3. CRITIQUES OF THE ADVISORY/INVESTIGATORY DISTINCTION

Despite some support, the distinction between advisory and investigative functions has also been subject to considerable critical commentary, even in relation to its applicability to the question of the appropriate procedures for different types of inquiry.

Assuming that it is possible to make the conceptual distinction between advisory and investigative functions, it has been argued that the distinction is not useful, since all or virtually all inquiries perform both functions; in fact all need to do both. Thus, for example, it has been suggested that "all commissions have both advisory and investigatory character" and that "what differs in fact is what they are investigating and advising on".[63] After examining the L.R.C.C. proposal, the New Zealand Public and Administrative Law Reform Committee concluded that "a commission should be able to move from an advisory role to an investigatory function as required. Indeed, it cannot always be foreseen whether a commission will be essentially advisory or investigative in nature".[64] Similarly, one commentator argues as follows:[65]

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61 Cartwright, *Royal Commissions and Departmental Committees in Britain* (1975), at 224-26, quoted in Macdonald, *supra*, note 31, at 373.

62 Robardet, *supra*, note 21, at 127.

63 Henderson, *supra*, note 16, at 507.

64 New Zealand, Public and Administrative Law Reform Committee, *Commissions of Inquiry* (1980), at 19.

65 Salter, *supra*, note 19, at 176.

> [A]ll inquiries—are mandated to conduct processes of fact- finding and to arrive at recommendations.... Obviously, inquiries differ as to the degree to which either fact-finding or achieving policy consensus is pursued and they probably can be arranged on a continuum with respect to the emphasis given to each aspect of their work. Nonetheless, both activities are always pursued to some extent and neither should be neglected in the examination of inquiries.

This critique does not attempt to deny the distinction between policy-oriented advisory functions and retrospective investigative functions. Rather, it concludes that most, if not all, inquiries will have to engage necessarily in both functions. Thus, any statutory reform based on the premise that some inquiries are primarily advisory as opposed to investigative would be ill-advised. Most, if not all, inquiries would find it necessary to exercise investigatory powers into discrete events in order to advise effectively on general policy matters.

The second critique argues that the conceptual distinction between advisory and investigative inquiries cannot be made because it is unaccompanied by analytical instruments permitting one to separate inquiries into the two groups. It has been suggested that the general reliance on Parts I and II of the federal *Inquiries Act*,[66] and the L.R.C.C.'s reliance on the notion that "almost every inquiry *primarily* either advises or investigates",[67] are unhelpful. This view would challenge the L.R.C.C.'s assumption that "the selection of a type of process on a functional basis can be more or less mechanical".[68] It has been suggested that "[i]t is difficult to believe that the distinction is either obvious or important if no basis for making the choice is provided and no means to review the decision to appoint one or the other of these two types is suggested".[69] Although the approach of the above two critiques differs, they end up agreeing that, for various reasons, inquiries cannot be divided into two main categories, and legislative reform that is premised upon this framework is doomed to failure.

The third critique argues that the conceptual distinction, if it can be made, does not really matter because the real issue ought to be the impact or consequences inquiries have for the individuals caught up in their proceedings. Shortly after the L.R.C.C. Report appeared, a leading exponent of this critique questioned the merit of the distinction between advisory and investigatory commissions, stating that "[i]n my view, the courts, in taking the view that these commissions, regardless of the power they exercise, are not subject to the constraints that are usual to courts, still preserve the shield of the so-called

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66 R.S.C. 1985, c. I-11.

67 L.R.C.C. Working Paper, *supra*, note 5, at 13 (emphasis added).

68 Robardet, *supra*, note 21, at 118.

69 Macdonald, *supra*, note 31, at 374.

investigatory commissions".[70] He argued that it would be preferable "to provide machinery to check commission powers as if they are traditional administrative tribunals, and abolish the myth of a quasi-judicial and administrative decision distinction that have shielded them from judicial review".[71] Similarly, while focusing on the limitations of the procedural alternatives advanced by the L.R.C.C., another commentator suggested that "[t]he concrete *effect* of the inquiry on the rights of the affected parties is the primary consideration in determining what sort of procedural requirements should be adopted and, therefore, the procedural model dichotomy is largely made irrelevant".[72] Thus, it would be wrong to premise legislative reforms on the challenged distinction if the result was to assume that an advisory commission did not have a harmful impact on affected individuals. Since the L.R.C.C.'s Working Paper[73] and Report[74] were issued, this critique has received some official recognition in what has come to be known as the "fairness revolution". Canadian courts have rejected a distinction between "administrative" and "quasi-judicial" functions as a basis for judicial review.[75] Even administrative decisions can have adverse effects on individuals and, for this reason, governments must act fairly in all its activities.

The fourth critique suggests that the attempt to classify inquiries functionally, for the purpose of determining the appropriate procedures, is ultimately misguided.

One commentator, for example, argues that the categories do serious damage to the real essence of the public inquiry, that is, its *ad hoc*, non-bureaucratic, flexible, and publicly consultative nature.[76] He defends inquiries for the distinctive functions they perform, notably providing the opportunity to frame issues.[77] He concludes that inquiries ought not to be assimilated to other institutions of government for purposes of review and remedies.

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70 Henderson, *supra*, note 16, at 507.

71 *Ibid.*

72 Robardet, *supra*, note 21, at 119 (emphasis in original).

73 L.R.C.C. Working Paper, *supra*, note 5.

74 L.R.C.C. Report, *supra*, note 25.

75 *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

76 Macdonald, *supra*, note 31, at 375-76.

77 *Ibid.*, at 387-89.

CHAPTER 5

THE LAW IN OTHER JURISDICTIONS AND REFORM PROPOSALS

In this chapter, we survey the law governing public inquiries in other jurisdictions and various proposals for reform. The emphasis is on the orientation of different reform options. Our specific proposals for reform are made in the next chapter.

1. THE AMERICAN APPROACH

Although the United States does not have the same long experience as Britain and the Commonwealth countries in the appointment of *ad hoc* investigatory bodies that are independent from the executive and the Legislature,[1] it does have considerable experience with investigative legislative committees, which have the power to compel testimony and the production of documents. The most infamous example, of course, is the House Committee on Unamerican Activities led by Senator Joseph McCarthy in the 1950s. In addition to the McCarthy hearings, Congressional investigatory hearings into the Credit Mobilier, Teapot Dome, Watergate, and the recent Iran-Contra affair have also played pivotal and more constructive roles in American history.

Congressional investigations are allowed for a broad range of purposes that are thought to be inherent to its legislative process. In a leading case, Chief Justice Warren described the power to investigate in the following terms:[2]

> It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress

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1 The best known would likely be the Warren Commission, appointed to investigate the assassination of President Kennedy.

2 *Watkins v. United States*, 354 U.S. 178 (1957), at 187.

to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

It should be noted that when arguments have been made that Congress has exceeded its legislative purposes in the course of an investigation the courts have rejected sharp distinctions between gathering legislative facts for policy making and gathering more particular facts about incidents of wrongdoing. Investigating specific facts about maladministration has been seen as a necessary pre-condition to effective legislative reform.

Congressional investigations have often explored possible criminal conduct.[3] In two cases dealing with allegations of wrongdoing and corruption arising from the Teapot Dome scandal, the United States Supreme Court held that it was not a valid objection to the investigation that it might disclose crime or wrongdoing, as long as the subject related to one upon which legislation was possible.[4] The Supreme Court has even upheld an investigation directed at individuals who were facing criminal charges. In *Hutcheson v. United States*,[5] it was held that a Congressional investigation into corruption in labour unions did not violate the due process rights of a union president indicted for bribery. Justice Harlan stated that "a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceedings...or when crime or wrongdoing is disclosed".[6] Part of the majority's opinion was related to deference to investigation by an elected body, but it was also based on a recognition of the fact that effective investigations for legislative purposes might have to trespass into matters that should be dealt with only through the criminal process. In their dissent, Chief Justice Warren and Justice Douglas noted that the target of the investigation had already been charged, was soon to be tried, and that the legislative purpose of investigating union corruption could be obtained without the details about this specific act of wrongdoing.

In general, the American courts have deferred to Congress's power of investigation, and have left to the courts the concern about whether those who

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3 Hamilton, *The Power to Probe[:] A Study of Congressional Investigations* (1977), ch. IV.

4 *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Sinclair v. United States*, 279 U.S. 263 (1929). See, also, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

5 369 U.S. 599 (1962).

6 *Ibid.*, at 618.

might be implicated in such investigations could receive a fair trial.[7] However, as we discuss below, protections under the American Bill of Rights[8] limit significantly the information that a Congressional investigation can compel a witness to provide if that witness might face subsequent criminal prosecution and is in danger of self-incrimination.

The American experience is of particular interest because of the way in which it has dealt with issues of self-incrimination. The Fifth Amendment of the American Bill of Rights provides, in part, that "[n]o person...shall be compelled in any criminal case to be a witness against himself". This right has been interpreted broadly to give witnesses at a Congressional investigation the right to refuse to testify on the grounds that such testimony would incriminate them.[9] In turn, however, Congress has enacted provisions allowing investigating committees to grant witnesses immunity from the use "in any criminal case" of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)".[10] It should be noted that this immunity relates not only to the subsequent use of the testimony given at the inquiry, but also to the direct or indirect use of such compelled information. It should also be noted, however, that it does not grant "absolute immunity against prosecution for the offence to which the questions relate".[11] Immunity is granted by a federal court upon a request approved by two-thirds of a Congressional committee. The Attorney General is allowed time to gather evidence and proceed with a prosecution before immunity is granted, but she cannot prevent the granting of immunity.[12] Thus, although the mechanics of granting immunity are greatly simplified by the representative nature of the investigatory committee, the executive, through the Attorney General, is effectively granted a qualified veto, since a period of time is allowed during which the Attorney General might pre-empt the immunity order with a

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7 These concerns might be addressed by the courts in a variety of ways, including postponing the trial, changing its venue, and sequestering the jury. The recent trial of Oliver North reveals the ability of American courts to conduct trials despite preceding widespread publicity caused by a Congressional investigation.

8 Being Amendments I to X, XIII to XV, XIX, XXIV and XXVI to the Constitution.

9 An important exception is that the right against self-incrimination does not apply to documents that are kept in an official rather than a personal capacity. See *McPhaul v. United States*, 364 U.S. 372 (1960), at 380.

10 Crimes and Criminal Procedure, 18 U.S.C. § 6002, as en. by Pub. L. No. 91-452, title II, § 201(a).

11 This was held to be a requirement of the Fifth Amendment in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), at 79, the Fifth Amendment was interpreted to require only that "compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution".

12 Crimes and Criminal Procedure, *supra*, note 10, § 6005(b) and (c), as en. by Pub. L. No. 91-452, title II, § 201(a).

prosecution. In both the Watergate and Iran-Contra scandals there were quarrels between special prosecutors and Congressional committees over the granting of immunity, with the former preferring prosecutions and the latter preferring full investigations.[13]

The above statutory immunity provisions are influenced by constitutional considerations. The Fifth Amendment was interpreted in the early 1970s not to require full transactional immunity, but rather to require only use and derivative use immunity. Thus, the constitutional minimum in the United States is now "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom...[The Fifth Amendment] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect".[14] The prosecution must demonstrate that it has an independent source for evidence adduced at subsequent prosecutions. In practice this means that either the prosecution's case must be sealed before an immunized witness starts to give public testimony before a Congressional committee, or prosecutors bear a heavy burden to show that they were not aided in any way or aware of the immunized testimony.[15]

Immunity has been used frequently in inquiries where it was necessary to compel testimony from minor officials, or where Congress determined that the benefits to be derived from public testimony at an inquiry outweighed those to be derived from criminal prosecutions. In addition to the strategic advantages in overcoming the privilege against self-incrimination, and in allowing investigations into wrongdoing, it is important to note that the American practice of granting immunity assumes that there will be inquiries into conduct that could be prosecuted as a criminal offence. As one commentator has noted, the immunity provisions demonstrate acceptance of "Congress's investigating criminal conduct. Laws giving immunity to witnesses forced to testify before Congress about criminal wrongdoing would not have been written unless it was believed that examination of criminal activities by Congress was permissible."[16]

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13 Van Cleve and Tiefer, "Navigating the Shoals of 'Use' Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair" (1990), 55 Mo. L. Rev. 43.

14 *Kastigar v. United States*, 406 U.S. 441 (1972), at 453 (emphasis in original).

15 On the extraordinary precautions taken by the special prosecutor in the Iran-Contra affair, see *United States of America v. Poindexter*, 698 F. Supp. 300 (D.D.C., 1988), at 312-13.

16 Hamilton, *supra*, note 3, at 104.

Other aspects of the American experience are also instructive. In a case somewhat analogous to *Re Nelles and Grange*,[17] discussed earlier in this report,[18] the publication of names in a report of a Congressional investigation was the subject of challenge. In *Doe v. McMillan*,[19] the report of a Congressional inquiry into schools in the District of Columbia published the tests and discipline reports of a few named students. The Supreme Court upheld the decision to publish the names out of deference to the Legislature's determination of what is relevant for the pursuit of its broad legislative purpose. On the other hand, the justices in dissent argued that the legislative purposes could easily have been achieved without "naming names".

Unlike *ad hoc* public inquiries, Congressional investigations are governed by permanent and promulgated rules that govern such topics as when a hearing should be open or closed and when live television or radio coverage should be allowed. For example, the rules of the Senate provide for closed hearings if, among other grounds, the Committee will be charging individuals with crimes, subjecting them to disgrace, or unduly invading their privacy. The rules of the House of Representatives allow any witness under subpoena the right to prohibit television and radio coverage and the taking of photographs while the person is testifying.[20]

Although witnesses before Congressional investigations have a right to expect that the Committee will adhere to various rules of the Senate or the House of Representatives,[21] they do not have the constitutional rights relating to the presentation of evidence and cross-examination that would be available in criminal trials.[22] In general, each investigating committee retains the right to shape its own rules about calling evidence, the admissibility of evidence, the role of a witness's lawyer, and the ability to cross-examine other witnesses.

Witnesses at legislative inquiries might argue that compulsion of their testimony would violate constitutional rights other than the right against self-incrimination. Several witnesses subpoenaed to appear before the House Committee on Unamerican Activities argued that such compulsion violated their

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17 (1984), 46 O.R. (2d) 210, 9 D.L.R.(4th) 79 (C.A.).

18 *Supra*, ch. 3, sec. 1(c)(i)b.

19 412 U.S. 306 (1973).

20 Hamilton, *supra*, note 3, at 255-58.

21 *Yellin v. United States*, 374 U.S. 109 (1963).

22 *United States of America v. Fort*, 443 F. 2d. 670, 143 U.S. App. D.C. 255 (D.C. Cir., 1970), cert. den. 91 S. Ct. 2255*n*, 403 U.S. 932 (1971).

First Amendment rights.[23] These arguments were rejected, in a number of closely divided cases, on the basis that Congress had a legitimate interest in investigating the influence of Communism.[24] On the other hand, an investigation by a Florida legislative committee into the affairs of the National Association for the Advancement of Colored People was overturned on constitutional grounds as infringing associational rights. Justice Goldberg held that the state had not met the onus of demonstrating a need for an inquiry into constitutionally protected activities.[25]

In summary, legislative committees in the United States exercise extensive investigative powers, including the power to investigate wrongdoing that might be the basis for subsequent criminal prosecution. In addition, the Fifth Amendment has been interpreted to provide not only protection from subsequent use of testimony and documents produced under compulsion at the inquiry, but also immunity from direct or indirect use of such compelled information. Moreover, Congressional investigations are guided by relatively formal procedural rules that give witnesses some rights to a closed hearing, but relatively few rights to call evidence and cross-examine other witnesses.

2. THE BRITISH APPROACH

Ad hoc public inquiries appointed by the executive have played an important role in the governance of the United Kingdom.[26] Although Canadian practice differs significantly from British practice, the origins of Canadian public inquiries can be found in the British experience with *ad hoc* investigatory bodies.

It is important, at a preliminary stage, to make a distinction between royal commissions, which are appointed on the basis of the inherent powers of the royal prerogative, and tribunals of inquiry, which are appointed under statutory provisions. The distinction is more than one merely of form. It relates to the powers that the different bodies enjoy and, in particular, to the powers they

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23 The First Amendment of the American Bill of Rights, *supra*, note 8, provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

24 *Barenblatt v. United States*, 360 U.S. 109 (1959).

25 *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

26 See, generally, Clokie and Robinson, *Royal Commissions of Inquiry[:] The Significance of Investigations in British Politics* (1937); Rhodes, *Committees of Inquiry* (1975); and Cartwright, *Royal Commissions and Departmental Committees in Britain[:] A Case-Study in Institutional Adaptiveness and Public Participation in Government* (1975).

possess to compel testimony and the production of documents. It relates as well to their method of appointment.

In Britain, Royal Commissions are appointed by the Crown, on the advice of the Cabinet. Tribunals of inquiry, on the other hand, are appointed on the basis of a joint resolution of both Houses of Parliament. Royal Commissions, which are appointed on the basis of inherent executive power, have no power at common law to compel witnesses to testify and produce documents.[27] At times, the instrument for the appointment of these commissions has granted the commissioners such powers. This is usually accomplished by granting the commissioners the same powers as a judge of the High Court. Nevertheless, many commissions are appointed without such powers. For example, in his inquiry into the security services and Mr. J.D. Profumo, Lord Denning reported that every witness invited appeared without having been subpoenaed.[28] In this respect the British experience differs from that in Canada. From the beginning, Canadian inquiries have been granted coercive investigatory powers, often by the terms of general framework legislation.

The role of royal commissions in Britain has been documented from the compilation of the Domesday Book, between 1080 and 1086, through the "great era" of royal commissions in Mid-Victorian England.[29] The authors saw commissions as an important substitute for the research and investigation apparatus of the modern state, and predicted their decline with the development of an expert bureaucracy. Other commentators have noted that the work of royal commissions and tribunals of inquiry have not been replaced entirely by the modern bureaucracy. They note that inquiries remain an important source for generating data from experts, publicizing initiatives and obtaining wide-ranging public participation.[30]

While Royal Commissions are appointed on the basis of inherent prerogative power, tribunals of inquiry are appointed pursuant to statutory authority under the *Tribunals of Inquiry (Evidence) Act 1921*.[31] This Act, which was passed hastily, and consists of only two substantive sections,[32] provides only a general framework for the appointment of inquiries. However, it does contemplate that all inquiries appointed under the Act will have the power to

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27 *Attorney-General for the Commonwealth of Australia v. The Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237 (P.C.), at 257. See, also, Hallett, *Royal Commissions and Boards of Inquiry[:] Some Legal and Procedural Aspects* (1982), ch. 2.

28 Cartwright, *supra*, note 26, at 144, and, more generally, ch. 8.

29 Clokie and Robinson, *supra*, note 26.

30 Cartwright, *supra*, note 26.

31 11 & 12 Geo. 5, c. 7 (U.K.).

32 Hallett, *supra*, note 27, at 91-92.

compel testimony and the production of documents. Thus, Britain has a two-track system consisting of Royal Commissions and tribunals of inquiry. Royal Commissions are established by an executive act and normally do not have coercive powers. Tribunals of inquiry, on the other hand, are established by the Legislature and always have coercive powers.

Section 1 of the *Tribunals of Inquiry (Evidence) Act 1921*[33] provides for the appointment of a tribunal by a resolution of both Houses of Parliament on the basis "that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance". The tribunal is given the same powers as are vested in the High Court with respect to enforcing the attendance of witnesses, examining witnesses on oath, affirmation, or otherwise, and compelling the production of documents. If a witness refuses to attend, testify or produce documents, the chairperson of the inquiry could certify the offence to the High Court, which, after inquiring into the alleged offence and after hearing the person's defence, could "punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court".[34] Witnesses are entitled to the same immunities and privileges as if they were witnesses in civil proceedings before the High Court.[35] A tribunal has the power over its own procedure to decide whether to allow interested persons to be represented by counsel.[36] Finally, the Act provides that a tribunal "shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given".[37]

A Royal Commission, headed by Lord Justice Salmon, was appointed in 1966 to examine the workings of the above Act.[38] The commission found that fifteen inquiries had been appointed under the Act dealing with matters such as allegations of police misconduct, government corruption, budget leaks, and spying. It concluded that there was a continued need for standing legislation to establish inquiries into "matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence".[39] The commission also concluded that inquiries should continue to be appointed by a

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33 *Supra*, note 31.

34 *Ibid.*, s. 1(2).

35 *Ibid.*, s. 1(3).

36 *Ibid.*, s. 2(*b*).

37 *Ibid.*, s. 2(*a*).

38 See United Kingdom, Royal Commission on Tribunals of Inquiry, *Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon* (Cmnd. 3121, 1966).

39 *Ibid.*, at 16.

resolution of both Houses of Parliament and that questions of contempt should continue to be handled by the courts. It noted that the inquisitorial powers of a commission exposed individuals to the risk of unfounded allegations without the protections of court proceedings. However, the commission set out the following cardinal principles, which, if strictly observed, would largely remove the dangers faced by individuals:[40]

> 1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
>
> 2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
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> 3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
>
> (b) His legal expenses should normally be met out of public funds.
>
> 4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
>
> 5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
>
> 6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

These principles are all designed to protect witnesses called before an inquiry and to approximate the rights that would be accorded an accused at a criminal trial. In order to implement these principles, the commission recommended that the present Act should be amended to give all witnesses the right to counsel and the right to call their own evidence, subject to the inquiry's discretion.[41] It also recommended that the Act should require inquiries to be headed by a person holding high judicial office and that the inquiry should have the discretion to award the witness costs.[42] In addition, the commission recommended that commissioners and lawyers should have immunity for what is said during the course of the inquiry, and in the report, and that inquiries should be represented by the Treasury Solicitor and have their own independent

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40 *Ibid.*, at 17.

41 *Ibid.*, at 23.

42 *Ibid.*, at 25.

counsel.[43] The commission further recommended that the failure of the 1921 Act to deal with the issue of self-incrimination should be handled by amending the Act to provide a witness with immunity from the use in any subsequent civil or criminal proceedings of evidence given before the inquiry, statements to the inquiry counsel and documents required to be produce at the inquiry.[44] This use immunity did not apply to criminal proceedings for giving false evidence.

Subsequent to this Royal Commission, an interdepartmental committee was established, also headed by Lord Salmon, to examine the applicability of the law of contempt as it related to tribunals of inquiry. In its report,[45] the Commission concluded that the law of contempt applicable to courts should apply generally to tribunals of inquiry, including retaining the powers of such tribunals to commit individuals for contempt of the tribunal.[46] In addition, it suggested that it should also be contempt to say, do or cause anything to be said or done that "is intended or obviously likely to alter, distort, destroy or withhold" relevant evidence from a tribunal.[47]

In 1973, the government issued a White Paper[48] on its views of the recommendations made in the two reports discussed above. The White Paper accepted in principle most of the above recommendations, rejecting only the idea that such tribunals should always be chaired by a judge,[49] and that Crown counsel should be disqualified from serving as counsel to the tribunal.[50] Although the government expressed agreement with the second cardinal principle quoted above, to the effect that a witness should be informed of allegations made against him, it commented that this raised "a number of difficult issues in practice" including the tribunal's discretion about disclosure of matters and the fact that in some inquiries "it may well be impossible to identify at the stage before evidence is called either the precise nature of the allegations or the persons against whom allegations can be made".[51] Although the government indicated

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43 *Ibid.*, ch. IV.

44 *Ibid.*

45 United Kingdom, *Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry* (Cmnd. 4078, 1969).

46 *Ibid.*, at 16-17.

47 *Ibid.*, at 17.

48 United Kingdom, *Tribunals of Inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921[:] Government views on the Recommendations of the Royal Commission on Tribunals of Inquiry and the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry* (Cmnd. 5313, 1973).

49 *Ibid.*, at 7. This recommendation was rejected on the basis that, at times, there might be a need for other forms of expertise.

50 *Ibid.*, at 8.

51 *Ibid.*, at 10.

that a bill implementing most of the Salmon Commission and Committee's recommendations would be introduced "when a suitable opportunity occurs", no such reforms were passed and the *Tribunals of Inquiry (Evidence) Act 1921* remains essentially in its original form.[52]

The recent report of the Committee of Justice-All Souls review of administrative law in the United Kingdom[53] supported the retention of public inquiries, but suggested that consideration should be given to a legislative code of procedure for major inquiries. It affirmed the importance of wide participation and, where possible, funding of such participation. It also approved of Lord Scarman's opening statement of purpose in the Red Lion Square Inquiry in 1974 in which he stated as follows:[54]

> [I]t is no part of this Inquiry to conduct a criminal investigation. It is not the object of this Inquiry to label people as offenders against the criminal law. This Inquiry is concerned with more general matters.... It is concerned with the course of events and actions which led to the disorder rather than with the identification of this, that or the other individual. Of course, it is obvious that one cannot consider the events and actions which led to the disorder without also considering the persons who took part in it. There is bound to be, therefore, an overlap between the broad purpose of this Inquiry and the rights and obligations of individual persons. Nevertheless, the emphasis in this Inquiry will be on the course of events not on particular individuals who took part in those events.

The Justice-All Souls Committee also approved of the procedures Lord Scarman set out for the conduct of the inquiry:[55]

> I shall refer briefly to the character of the Inquiry that it is my duty to hold and also to the terms of reference. First of all—and I stress it—this is an Inquiry not a piece of litigation. It is not the sort of adversary-type confrontation between parties with which we English lawyers are familiar in the criminal and civil trials of our country. This Inquiry is to be conducted—and I stress it—by myself.... First of all, it is I, and I alone, who will decide what witnesses will be called. I also decide to what matters their evidence will be directed. There is, in an Inquiry of this sort, no legal right to cross-examination, but I propose, within limits, to allow cross-examination of witnesses to the extent that I think it helpful to the forwarding of the Inquiry, but no further. I also have to determine how witnesses will be examined, bearing in mind the inquisitorial

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52 Neill, *Administrative Justice[:] Some Necessary Reforms*, report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom (1988), at 315.

53 *Ibid.*

54 Quoted in Neill, *ibid.*, at 413, App. 13.

55 *Ibid.*, at 412.

> rather than the adversarial nature of the Inquiry. All witnesses will first be examined by Tribunal Counsel. An opportunity will then be afforded to those persons who have been granted representation to cross-examine the witnesses called. The cross-examination will be subject, of course, to the limits that I impose, and it should be directed to eliciting matters that affect those who are represented. No witness will be called to give evidence unless he or she has first given to the Tribunal a written statement of evidence. It is from the written statements of evidence submitted to the Tribunal that I shall make my selection as to the witnesses to be called. The only criterion that I propose to observe in exercising this power of selection will be the extent to which, in my judgment, the witness can help the Inquiry.

Thus the committee sanctioned many of the inquisitorial aspects of inquiry procedure, with some rights for affected parties to engage in cross-examination.

The committee concluded its examination of public inquiries with the following statement:[56]

> The end product of an inquiry is not necessarily an impartial decision; inevitably it is influenced by policy, and policy may fluctuate abruptly in response to a number of factors bearing on political responsibility. Thus the individual may be dissatisfied because of his disagreement with the determining policy, or because the superficial resemblance of inquiries to judicial proceedings encourages expectations of a judicial result, or, in the case of a retrospective inquiry, because of some adverse reflection on his reputation contained in the report which he has no means of challenging. But these things are of the nature of inquiries and perhaps the best that can be done to dispel dissatisfaction is to make the limitations clear at the outset of the proceedings.

Thus, although their use is less frequent than in Canada, public inquiries are still widely used in the United Kingdom. Such inquiries do not seem to have received the same degree of criticism in the United Kingdom as they have received in Canada. It would appear that, while some inquiries are retrospective examinations into past events, even these inquiries aim to be concerned with more general matters.

3. THE AUSTRALIAN APPROACH

The Australian approach is particularly significant because, as in Canada, inquiries are not only based on the British model, they are also influenced by the diversity inherent in a federal state. As in Canada, both the federal and state

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56 *Ibid.*, at 327.

levels of governments have general statutes governing the appointment of inquiries.

In 1902 the Commonwealth enacted the *Royal Commissions Act 1902*,[57] which, as amended, provides a relatively comprehensive legislative framework for the appointment of inquiries. It empowers the Governor-General to appoint "such person or persons, as he thinks fit...to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth".[58] Section 2 of the Act grants any member of a commission the power to summon a person and to produce "such documents or other things (if any) as are referred to in the summons".[59] Failure to attend or produce documents without "reasonable excuse"[60] is an offence punishable by a fine of $1,000 or imprisonment for six months.[61] It is a defence, however, to a prosecution for a failure to produce documents if it is proved that they were "not relevant to the matters into which the Commission was inquiring".[62] Knowingly giving false or misleading evidence to a commission is an offence punishable by imprisonment for a period not exceeding five years or a fine not exceeding $20,000.[63]

Search warrants are available from the court where the commission has reasonable grounds for believing that if a summons were issued the evidence "might be concealed, lost, mutilated or destroyed".[64] The warrant is required to state the purpose for which it was issued, including a reference to the matter into which the commission is inquiring and with which the items to be seized are related.[65] Destroying or concealing such evidence is an offence subject to two years' imprisonment or a fine up to $10,000.[66] Seized documents or things must be returned when their retention "ceases to be reasonably necessary for the purposes of the inquiry" unless the commission has exercised its powers to refer information that relates or may relate to the commission of an offence to law

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57 No. 12, 1902 (Aust.).

58 *Ibid.*, s. 1A, as en. by No. 4, 1912 (Aust.), s. 3.

59 *Ibid.*, s. 2(1), as en. by No. 139, 1982 (Aust.), s. 4.

60 "Reasonable excuse" is defined to mean "an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law": *ibid.*, s. 1B, as en. by No. 4, 1912 (Aust.), s. 3.

61 *Ibid.*, s. 3(2), as en. by No. 139, 1982 (Aust.), s. 4.

62 *Ibid.*, s. 3(3), as en. by No. 139, 1982 (Aust.), s. 4.

63 *Ibid.*, s. 6H, as en. by No. 139, 1982 (Aust.), s. 12.

64 *Ibid.*, s. 4(1)(b), as en. by No. 139, 1982 (Aust.), s. 4.

65 *Ibid.*, s. 4(4)(a), as en. by No. 139, 1982 (Aust.), s. 4.

66 *Ibid.*, s. 6K, as en. by No. 139, 1982 (Aust.), s. 13.

enforcement officials.[67] There are also statutory powers to apprehend and detain a person served with a summons who fails to attend at the commission.[68]

Since 1912, protection has been provided against the subsequent use of "[a] statement or disclosure made by any witness in answer to any question put to him by a Royal Commission".[69] This protection was effectively expanded in 1982 with the enactment of section 6A of the Act, which provides as follows:[70]

> 6A.—(1) It is not a reasonable excuse...for a person to refuse or fail to produce a document or other thing that he was required to produce at a hearing before a Commission that the production of the document or other thing might tend to incriminate him.
>
> (2) A person is not entitled to refuse or fail to answer a question that he is required to answer by a member of a Commission on the ground that the answer to the question might tend to incriminate him.
>
> (3) This section does not apply where the offence in respect of which the production of a document or other thing or the answer to a question might tend to incriminate a person is an offence with which the person has been charged and the charge has not been finally dealt with by a court or otherwise disposed of.

By virtue of section 6A(3), where a charge is pending against a witness in relation to the matter for which his testimony is sought at a public inquiry, it would appear that the common law right of a witness not to incriminate himself has been restored.

Even before the enactment of the above provision, the Australian High Court restrained a federal commission from asking questions of an individual against whom an information had been laid concerning the same matter, until the criminal trial was completed.[71] The court recognized that the commission's proceedings had a different function than the ongoing criminal trial, but held that examination at a public inquiry was very likely to prejudice the individual in his defence, and that there was a real risk of interference with the administration of justice. Gibbs C.J. noted:[72]

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67 *Ibid.*, s. 6F, as en. by No. 139, 1982 (Aust.), s. 10.

68 *Ibid.*, s. 6B, as en. by No. 4, 1912 (Aust.), s. 7, as am. by No. 139, 1982 (Aust.), s. 7.

69 *Ibid.*, s. 6DD, as en. by No. 4, 1912 (Aust.), s. 7.

70 *Ibid.*, s. 6A, as en. by No. 139, 1982 (Aust.), s. 6.

71 *Hammond v. The Commonwealth of Australia* (1982), 56 A.L.J.R. 767 (Aust. H.C.).

72 *Ibid.*, at 770.

> It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.... [T]he public interest can be met, and the interests of justice at the same time safeguarded, if the inquiry proceeds to its conclusions without further examination of the plaintiff.

In a subsequent case, the court refused to extend this reasoning to a person who was a suspect, but who had not yet been charged with a criminal offence.[73] The 1982 amendments,[74] of course, reach a similar result, reviving the right to refuse to testify or produce incriminating evidence for those charged with offences, but not for those who are only suspects.

The Australian legislation contains a number of statutory provisions governing the conduct of hearings. Cross-examination is essentially left to the discretion of the commission.[75] Witnesses are entitled to a reasonable sum for their attendance.[76] Since 1912, a witness is allowed to refuse to testify about "any secret process of manufacture".[77] More importantly, commissions are given the power to take evidence in private on the grounds that "the evidence relates to the profits or financial position of any person, and that the taking of the evidence in public would be unfairly prejudicial to the interests of that person".[78] In addition, anyone who publishes evidence, contents of a document, or information that enables a person who testified to be identified if the commission has directed that the evidence not be published or be published only in a specified manner, is guilty of a summary conviction offence punishable by a fine of up to $2,000 or twelve months' imprisonment.[79] Commissioners, lawyers, and witnesses are given the same immunities for their conduct as they would receive in a court of law.[80]

The above Commonwealth legislation would appear to provide the most elaborate statutory framework in Australia. The various state statutes either appear in similar terms or contain less elaborate provisions relating to compelling testimony and the production of documents.

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73 *Sorby v. The Commonwealth of Australia* (1983), 57 A.L.J.R. 248 (Aust. H.C.).

74 *Royal Commissions Amendment Act 1982*, No. 139 (Aust.).

75 *Royal Commissions Act 1902*, *supra*, note 57, s. 6FA, as en. by No. 1, 1933 (Aust.), s. 4, as am. by No. 139, 1982 (Aust.), s. 11.

76 *Ibid.*, s. 6G, as en. by No. 4, 1912 (Aust.), s. 7.

77 *Ibid.*, s. 6D(1), as en. by No. 4, 1912 (Aust.), s. 7.

78 *Ibid.*, s. 6D(2), as en. by No. 1, 1933 (Aust.), s. 2.

79 *Ibid.*, s. 6D(3) and (4), as en. by No. 139, 1982 (Aust.), s. 8.

80 *Ibid.*, s. 7, as am. by No. 139, 1982 (Aust.), s. 15.

The greatest diversity among the various state statutes concerns the issues of self-incrimination and the subsequent use of testimony and documents introduced at an inquiry. For example, legislation in Victoria provides powers of compulsion subject to the limited protection that answers to questions cannot be used in subsequent civil or criminal proceedings.[81] This legislation has been criticized for granting powers of compulsion to all inquiries and for its limited self-incrimination protections.[82] Other legislation, such as that in Queensland,[83] has been interpreted not to abrogate the common law privilege against self-incrimination.[84] Legislation in Tasmania abrogates the common law privilege against self-incrimination and provides that, with the exception of false evidence prosecutions, "[n]o evidence taken before the commission shall be admissible against any person in any civil or criminal proceeding".[85] Section 21 of the Tasmania Act provides an even broader form of transactional immunity in the following terms:[86]

> 21.—(2) Every witness examined before the commission who, in the opinion of the commission, makes a full and true disclosure touching all the matters in respect of which he is examined, shall be entitled to receive a certificate that he has made such disclosure, signed by the president or chairman of the commission or by the sole commissioner, as the case may be.
>
> (3) If any civil or criminal proceeding is at any time thereafter instituted against any such witness in respect of any matter touching which he has been so examined, the court having cognizance of the case, or a judge of the said court sitting in chambers, shall, on his application, and on proof of the certificate, stay the proceedings, and may in its or his discretion award to the witness such costs incurred by him in or by reason of the proceeding as to the court or judge may appear reasonable.

Of course, these provisions apply only to those who have testified at an inquiry. The more general provision that "[n]o evidence taken before the commission shall be admissible against any person in any civil or criminal proceeding"[87] grants use immunity only, and the Tasmania Supreme Court has held that if it purported to grant transactional or subject-matter immunity, Parliament "would have said so in clear and unequivocal language".[88]

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81 *Evidence Act 1958* (Vict.), Part I, Div. 5.

82 Hallett, *supra*, note 27, at 94-95.

83 *The Commissions of Inquiry Act of 1950*, 15 Geo. 6, No. 2 (Queensland).

84 *Sorby v. The Commonwealth of Australia*, *supra*, note 73.

85 *Evidence Act, 1910*, 1 Geo. V, No. 20 (Tas.), s. 21(4).

86 *Ibid.*, s. 21(2) and (3).

87 *Ibid.*, s. 21(4).

88 *R. v. Cosgrove*, [1948] Tas. S.R. 99 (S. C.), at 106.

In New South Wales, provisions abrogating the common law privilege against self-incrimination and providing limited use immunity do not come into effect unless declared to do so in the letters patent appointing the inquiry.[89] One factor contributing to the diversity of these responses to the self-incrimination issue is that the Australian states, unlike Canadian provinces, have the power to legislate in relation to procedure in criminal trials.

The Australian states also have some varying and innovative provisions governing the conduct of hearings. For example, the Western Australian legislation[90] makes it an offence to prevent a witness from attending an inquiry[91] or to cause violence, punishment, damage, loss, or disadvantage to a witness on account of her testimony.[92] It is also a specific offence for an employer to dismiss or prejudice an employee on account of such testimony.[93] Section 5 of the South Australian statute[94] provides a guarantee of the independence of inquiries in the following terms:

> 5. The commission may publish such (if any) information obtained in the exercise of their functions as they think fit.

This provision provides significant protection for the independence of inquiries, which, as discussed earlier in this report,[95] is one of their most distinctive attributes.

Section 4A of the Queensland statute[96] deals with the interaction between commissions and courts, and provides a mechanism for the Attorney General to certify that a matter otherwise under the jurisdiction of a court, tribunal, warden, coroner, or justice, is before a commission and that those bodies no longer have jurisdiction over the matter. A 1987 amendment also contemplates that a commission may inquire and report "notwithstanding that any other proceedings may be in or before any court, tribunal, warden, coroner, justice or other person and notwithstanding any order made by a court with respect thereto".[97]

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89 *Royal Commissions Act, 1923*, No. 29 (N.S.W.), s. 17(4).

90 *Royal Commissions Act, 1968*, No. 65 (Western Aust.).

91 *Ibid.*, s. 28.

92 *Ibid.*, s. 29.

93 *Ibid.*, s. 30.

94 *Royal Commissions Act, 1917*, No. 1272 (South Aust.).

95 *Supra*, ch. 1.

96 *The Commission of Inquiry Act of 1950*, *supra*, note 83.

97 *Ibid.*, s. 4A, as en. by No. 38, 1954, 3 Eliz. 2 (Queensland), s. 2, as am. by No. 59, 1987 (Queensland), s. 5(4).

In summary, it would appear that, to a large extent, the Australian statutes follow the British and Canadian models; however, they do have a number of innovative provisions, particularly in relation to the issue of self-incrimination and the protection of an inquiry's independence.

4. THE NEW ZEALAND APPROACH

Originally, the New Zealand legislation attempted to limit the grounds for appointing a public inquiry by providing that the Governor-General in Council may appoint a commission to inquire into and report only upon "any question arising out of the administration of the Government, or the working of any existing law, or regarding the necessity or expediency of any proposed legislation, or concerning the conduct of any officer in the public service".[98] In 1958, a fifth category was added, namely "[a]ny disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury".[99] In 1970, a basket clause covering "[a]ny other matter of public importance"[100] was added.

The conduct of inquiries in New Zealand is governed by a statutory right of standing that provides that any person who satisfies the commission that she "has an interest in the inquiry apart from any interest in common with the public, [is] entitled to appear and be heard at the inquiry".[101] In addition, "[a]ny person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates".[102] Originally the Act contemplated that there would be "parties" to a commission, with guaranteed rights of participation and liability for costs. This notion led to the prohibition by the courts of an early inquiry investigating bribery on the basis that an individual being subjected to investigation was actually being "put to answer for a crime or criminal offence" outside of a court of law.[103] The notion that there should be "parties" to an inquiry has now fallen out of use and has been rejected

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98 *Commissions of Inquiry Act 1908*, No. 25 (N.Z.), s. 2.

99 *Ibid.*, s. 2, as en. by 1958, No. 58 (N.Z.), s. 2.

100 *Ibid.*, s. 2, as am. by 1970, No. 53 (N.Z.), s. 2.

101 *Ibid.*, s. 4A(1), as en. by 1980, No. 2 (N.Z.), s. 4.

102 *Ibid.*, s. 4A(2), as en. by 1980, No. 2 (N.Z.), s. 4.

103 *Cock v. The Attorney-General* (1909), 28 N.Z.L.R. 405 (C.A.).

by the courts.[104] Moreover, the New Zealand Public and Administrative Law Reform Committee has proposed that the notion should be abolished.[105]

A commission appointed under the New Zealand Act may "order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Commission", on terms that it considers just.[106] Provision is made for the travelling and maintenance expenses of witnesses summoned to testify at an inquiry.[107] Refusal to testify or produce documents is subject only to a fine not exceeding $1,000.[108] If, however, one of the commissioners is a judge of the High Court, the commission is then granted the same powers as that judge would have in her judicial capacity.[109] The commission's order may be filed in the High Court and is enforceable as a judgment of that court in civil proceedings.[110] There is no provision either abrogating the common law privilege against self-incrimination or providing immunity from subsequent use of testimony or documents produced at an inquiry.

In 1980, the New Zealand Public and Administrative Law Reform Committee issued its report on commissions of inquiry.[111] The committee expressed general approval for the role of public inquiries, stressing, in particular, the involvement of the public in their deliberations. The committee stated that the provision of the New Zealand Act that bases the power of an inquiry on whether or not its chair is a judge was "anachronistic and should be abolished".[112] It rejected expanded funding of witnesses on the grounds "that by and large persons or groups with sufficient interest to appear before a commission should bear their own costs. This can be said to follow from the fact that they have a direct interest in the subject matter of the inquiry."[113] Interestingly, the committee did not deal with the issue of self-incrimination, although it did state that although a summoned witness should be subject to some punishment for non-attendance or non-production "[w]e have misgivings about the imposition of a term of imprisonment and recommend an increase in

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104 *Timberlands Woodpulp, Ltd. v. Attorney-General*, [1934] N.Z.L.R. 270 (Full Ct.).

105 New Zealand, Public and Administrative Law Reform Committee, *Commissions of Inquiry* (1980), at 35-37.

106 *Commissions of Inquiry Act 1908*, *supra*, note 98, s. 4C(3), as en. by 1980, No. 2 (N.Z.), s. 4.

107 *Ibid.*, ss. 7 and 8, as en. by 1980, No. 2 (N.Z.), s. 4.

108 *Ibid.*, s. 9(3), as en. by 1980, No. 2 (N.Z.), s. 4.

109 *Ibid.*, s. 13(1).

110 *Ibid.*, s. 13(2).

111 *Supra*, note 105.

112 *Ibid.*, at 24.

113 *Ibid.*, at 28.

the fine only".[114] The committee also proposed that the independence of inquiries should be protected by requiring that the publication of its report be automatic after its presentation to the Governor General, unless its terms of reference provide otherwise.[115]

The committee surveyed a line of Commonwealth authorities holding that the conduct of public inquiries was an "administrative" function since it did not render a final binding decision. Nevertheless, noting "the increasing emphasis on the common law of an obligation to be fair, as distinct from the obligation to act judicially",[116] the committee proposed a wide right of judicial review "for an aggrieved person or one who fears that his rights or interests may be neglected by a commission to challenge in the High Court the legality of what has been done or is proposed to be done".[117]

5. OTHER PROVINCES IN CANADA

There is significant variety in provincial legislation governing the appointment, conduct and reporting of public inquiries. Like the Ontario *Public Inquiries Act* prior to 1971,[118] some of the provincial statutes concern themselves primarily with vesting public inquiries with powers to compel testimony and the production of documents. Other statutes provide more elaborate provisions that attempt to govern the conduct of public inquiries. Most provinces follow the Ontario model in providing general provisions for the appointment of all inquiries. British Columbia, in a manner similar to the federal legislation,[119] provides separate provisions for the Cabinet's appointment of general public inquiries and a Minister's appointment of narrower public inquiries into governmental misconduct.[120]

Provisions governing the appointment of inquiries in all provinces permit the appointment of public inquiries on general grounds tied to subjective determinations by the Lieutenant Governor in Council that the matter is of public importance. Many of the statutes also list specific instances in which a public inquiry may be appointed. These generally concern matters such as "the good government" or "public business" of the province, the administration of

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114 *Ibid.*, at 29.

115 *Ibid.*, at 32.

116 *Ibid.*, at 37.

117 *Ibid.*, at 38.

118 See *The Public Inquiries Act*, R.S.O. 1970, c. 379.

119 *Inquiries Act*, R.S.C. 1985, c. I-11.

120 See *Inquiry Act*, R.S.B.C. 1978, c. 198.

justice, provincial electoral matters, and municipal affairs.[121] The Prince Edward Island *Public Inquiries Act*[122] specifically authorizes inquiries into the cost and retail sale price of goods in the province.[123] Although the specific matters mentioned in the provincial statutes generally relate to matters clearly within provincial jurisdiction, the open-ended and discretionary grant of the power to appoint public inquiries means that provincial legislation generally does not attempt to provide restraints on the appointment of public inquiries.

The legislation in several provinces contains provisions regarding the funding of a commission. For example, the British Columbia *Inquiry Act*[124] provides for the appointment of staff with "salaries and allowances fixed and provided by the Lieutenant Governor in Council".[125] It further provides that the costs and expenses incurred by the commission shall be paid out of the consolidated revenue fund in the absence of a special appropriation.[126] The New Brunswick Act contains similar provisions.[127]

The Quebec Act[128] is unique in imposing an obligation on the government to limit the duration of the inquiry process, and tying a set completion date to the funding of the inquiry. Section 19 of the Act provides as follows:

> 19. The Gouvernement shall fix the date when the commissioners shall complete their labours and reports, and the limit of the expenditure on such commission; after which date all expenses of the commission shall cease.

It should be noted that this provision does not necessarily contemplate that the government will fix a date at the start of an inquiry, but does make the setting of some termination date mandatory. The provision requires the government to limit the length of commissions and by doing so, may promote efficiency and economy. The ability of the government at any time to require an inquiry to report may, however, limit its independence.

All the provincial and territorial statutes dealing with public inquiries grant inquiries the power to compel testimony and the production of documents. This is significant because, regardless of the actual use made of these coercive powers,

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121 See, for example, *The Manitoba Evidence Act*, R.S.M. 1987, c. E150, s. 83(1), and *Inquiries Act*, R.S.N.B. 1973, c. I-11, s. 2.

122 R.S.P.E.I. 1988, c. P-31.

123 *Ibid.*, s. 1.

124 *Supra*, note 120.

125 *Ibid.*, s. 13.

126 *Ibid.*, s. 18.

127 *Inquiries Act*, *supra*, note 121, s. 16.

128 *An Act respecting public inquiry commissions*, R.S.Q. 1977, c. C-37.

there is no statutory precedent in Canada for reliance on individuals testifying and producing documents voluntarily. In this respect, Canada has not followed the British tradition with respect to Royal Commissions.

Summonses to witnesses issued by public inquiries are generally enforced by granting an inquiry the same enforcement power to compel testimony and the production of documents that civil courts have with respect to these matters.[129] In these cases, provincial inquiries themselves have the power to fine recalcitrant witnesses or commit them to jail for contempt. In Alberta, inquiries have the power to commit a witness to jail for contempt only if one of the commissioners is a judge of the Alberta Queen's Bench.[130] Most provincial statutes resemble the Ontario *Public Inquiries Act* prior to the 1971 reforms.[131] As discussed earlier in this report,[132] following the suggestion of the *Royal Commission Inquiry into Civil Rights*,[133] Ontario vested the enforcement of a commission's powers not with the commission itself, but with the Divisional Court.[134] Ontario is unique in guaranteeing individuals who refuse to comply with a summons an independent judicial hearing before punishment is imposed.

Some of the provincial statutes limit the penalties for refusal to obey a public inquiry's summons. For example, section 91 of the *Manitoba Evidence Act*[135] provides that where an individual refuses without lawful excuse to take an oath or answer questions, "the commissioners may, by warrant signed by the commissioners or any of them, commit the person so refusing to a common gaol, there to remain and be imprisoned for a term not exceeding one month, unless in the meantime he consents to be examined". The New Brunswick legislation is similar, but also provides that, if after thirty days the witness "persists in his former refusal, the commissioners may recommit him for a further period not exceeding thirty days, and so on from time to time until such person ceases to persist in his refusal".[136] The New Brunswick Act is unique only in acknowledging the potential of indeterminate detention for refusal to obey a summons; other statutes that simply grant a commission the same enforcement powers of a civil court could also authorize such detention.

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129 See, for example, the Prince Edward Island *Public Inquiries Act*, *supra*, note 122, s. 4. While some of the provincial statutes provide the defence of a "lawful excuse" for a failure to obey a summons, others do not.

130 *Public Inquiries Act*, R.S.A. 1980, c. P-29, s. 5.

131 See *The Public Inquiries Act*, *supra*, note 118.

132 *Supra*, ch. 2, sec. 1.

133 Ontario, *Royal Commission Inquiry into Civil Rights* (1968) (referred to as the "McRuer Report").

134 See, now, *Public Inquiries Act*, R.S.O. 1990, c. P.41, s. 8, discussed *supra*, ch. 2, sec. 4.

135 *Supra*, note 121.

136 *Inquiries Act*, *supra*, note 121, s. 6(2).

Although public inquiries are granted the power to compel testimony and the production of documents, relatively few provinces have included provisions governing the use of such testimony and evidence in subsequent proceedings. As discussed earlier in this report,[137] provincial reluctance to legislate with respect to the admissibility of evidence in criminal trials may reflect an accurate perception of the limits of provincial jurisdiction. A few provinces provide that witnesses before an inquiry shall be informed of their right to object to answering questions under section 5(1) of the *Canada Evidence Act*.[138] The Northwest Territories has duplicated the provision in the Ontario Act,[139] which deems a witness to have objected to answer any question asked on the ground that the answer may tend to incriminate the witness, and provides that "no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence".[140] Similarly, section 5(1) of the regulations passed under the New Brunswick Act[141] provides as follows:[142]

> 5.—(1) No answer given by a witness at an inquiry is thereafter receivable in evidence in any civil trial to which that person is a party or in any other proceedings against him, other than a prosecution for perjury in giving that evidence.

The Newfoundland legislation[143] contemplates a witness objecting to answer questions on the grounds that they "may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person".[144] If the claim of privilege would have been valid but for the compulsion provided in that Act or the *Canada Evidence Act*,[145] "the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence".[146] The Quebec Act[147] is unique insofar as it conditions the grant of subsequent use immunity upon

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137 *Supra*, ch. 3, sec. 1(c).

138 R.S.C. 1985, c. C-5. See Procedure Order—Inquiries Act, N.B. Reg. 83-167, s. 5(2), and *Public Inquiries Ordinance*, O.N.W.T. 1977, c. 6 (1st Sess.), s. 9(1).

139 *Public Inquiries Act*, *supra*, note 134, s. 9(1).

140 *Public Inquiries Ordinance*, *supra*, note 138, s. 9(2).

141 *Inquiries Act*, *supra*, note 121.

142 Procedure Order—Inquiries Act, *supra*, note 138.

143 *The Public Enquiries Act*, R.S.N. 1970, c. 314.

144 *Ibid.*, s. 3(3).

145 *Supra*, note 138.

146 *The Public Enquiries Act*, *supra*, note 143, s. 3(3).

147 *An Act respecting public inquiry commissions*, *supra*, note 128.

performance before the inquiry, and allows the commission to grant a witness a certificate providing for such immunity. Section 11[148] of Quebec Act provides as follows:

> 11. Any person refusing to be sworn when duly required, or omitting or refusing, without just cause, sufficiently to answer any question that may be lawfully put to him, or to render any testimony in virtue of this act, shall be deemed to be in contempt of court and shall be punished accordingly.
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> No answer given, however, by any person so heard as a witness, may be used against him in any prosecution under any act of the Legislature, if the commissioners have given him a certificate establishing that he has claimed the right to be excused from answering, and has given full and truthful answers to the satisfaction of the said commissioners.

In addition to the power to summons witnesses and compel the production of evidence, a number of provincial statutes grant public inquiries some power to inspect public buildings and documents. For example, section 6 of the Alberta *Public Inquiries Act*,[149] provides, in part, as follows:

> 6.—(3) If a commissioner who is also a judge of the Court of Appeal, the Court of Queen's Bench or the Provincial Court is of the opinion that a view or inspection of any public building will assist the inquiry, he may issue an order permitting any person whom he names in the order, together with any peace officer that person calls on to assist him, to enter, if necessary by force, and view or inspect the public building.
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> (4) A commissioner other than one referred to in subsection (3) who has reasonable grounds to believe that a view or inspection of any public building will assist the inquiry may apply ex parte to the Court of Queen's Bench for an order permitting any person named in the order, together with any peace officers that person calls on to assist him, to enter, if necessary by force, and view or inspect the public building.

Public buildings are defined broadly to include, among other things, "any...building or part of a building where a Government funded service is carried on".[150] Seized evidence can be retained until the conclusion of the inquiry or until such evidence is no longer required.[151] In Manitoba, a commissioner has the power to enter and inspect any land, building, works, or property if, in her

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148 As am. by S.Q. 1986, c. 95, s. 100.

149 *Supra*, note 130.

150 *Ibid.*, s. 6(2)(*b*)(iii).

151 *Ibid.*, s. 6(5).

opinion, a view will assist in the inquiry.[152] A commissioner may also order that any public records "relating to persons or matters within the scope of the inquiry" be searched without charge.[153]

Relatively few provincial statutes attempt to govern the proceedings of public inquiries. Section 4 of the Ontario *Public Inquiries Act*,[154] which governs the holding of public and private hearings, has been adopted in the Northwest Territories.[155] In addition, several statutes require some form of public notice about either the appointment or the first hearing of a public inquiry.[156] Quebec is unique in providing that no inquiry shall be adjourned for more than one week without authorization from the Minister of Justice.[157]

The public inquiries legislation in most provinces contains explicit provisions governing the payment of witnesses, usually in accordance with tariffs provided for court actions or prescribed in regulations passed under the Act. The Quebec legislation provides that witnesses who are examined before a commission and who live more than ten miles from the place of examination may be allowed the actual cost of their travelling expenses and the cost of maintenance during the time they are detained by the inquiry.[158]

Some provincial statutes contain provisions governing the availability of legal counsel. In the Yukon Territory, a person has the right to be represented by counsel where his actions or conduct are called into question in the course of an inquiry.[159] In ministerial inquiries in British Columbia a person "against whom any charge is made in the course of an inquiry" has a right to be represented by counsel.[160]

In general, the provincial statutes are either silent on the evidentiary rules that should govern the inquiry's conduct or they incorporate the privileges that a person would enjoy in a court of law. The Alberta *Public Inquiries Act*[161]

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152 *The Manitoba Evidence Act*, *supra*, note 121, s. 89.

153 *Ibid.*, s. 94.

154 *Supra*, note 134.

155 *Public Inquiries Ordinance*, *supra*, note 138, s. 7.

156 See the Quebec Act, *An Act respecting public inquiry commissions*, *supra*, note 128, s. 5; the British Columbia *Inquiry Act*, *supra*, note 120, s. 11; and *The Manitoba Evidence Act*, *supra*, note 121, s. 86.

157 *An Act respecting public inquiry commissions*, *supra*, note 128, s. 5.

158 *Ibid.*, s. 13.

159 *Public Inquiries Act*, R.S.Y.T 1986, c. 137, s. 6.

160 *Inquiry Act*, *supra*, note 120, s. 4(1).

161 *Supra*, note 130.

provides that "[e]very person has the same privileges in relation to the disclosure of information and the production of documents, papers and things under this Act as witnesses have in any court".[162] However, section 8(3)(*a*) of the Alberta Act provides that, notwithstanding the above provision, "no provision in an Act, regulation or order requiring a person to maintain secrecy or not to disclose any matter applies with respect to an inquiry". Evidence with respect to matters that ordinarily would not be disclosed by law, order, or regulation is taken in private and "shall not be published, released or disclosed in any matter without the written permission of the Attorney General".[163] The Alberta Act also sets out an elaborate procedure that allows the Attorney General to certify that information should not be disclosed on the grounds that it deals with Cabinet deliberations, "matters of a secret or confidential nature", or matters that would "prejudice...the interests of persons not concerned in the inquiry".[164]

Several provinces provide procedural protections before a commission makes a finding of wrongdoing. Regulations passed under the New Brunswick Act are similar to provisions in the Ontario *Public Inquiries Act*,[165] requiring that notice be given before a finding of misconduct can be made in the inquiry's report, and granting the right to call evidence and cross-examine witnesses to those with "a substantial and direct interest in the subject matter of the inquiry".[166] Section 7 of the Prince Edward Island *Public Inquiries Act*[167] follows the federal *Inquiries Act*[168] in providing as follows:

> 7. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct against him and he has been allowed full opportunity to be heard in person or by counsel.

Few provinces attempt to govern the availability of judicial review of the conduct of an inquiry. *The Manitoba Evidence Act*[169] provides review provisions similar to the stated case procedure contained in section 6 of the Ontario Act,[170] that can be used by either the commission or the person affected. The inquiry

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162 *Ibid.*, s. 8(1).

163 *Ibid.*, s. 8(6).

164 *Ibid.*, s. 8(4).

165 *Supra*, note 134, s. 5.

166 Procedure Order—Inquiries Act, *supra*, note 138.

167 *Supra*, note 122.

168 *Supra*, note 119, s. 13.

169 *Supra*, note 121, s. 95.

170 *Supra*, note 134.

proceedings are stayed until the validity of the commission or "any decision, order, direction, or other act" is decided by the Court of Appeal.[171]

British Columbia is the only province that has attempted to give legislative protection to the independence and integrity of public inquiries. Section 14(2) of the British Columbia *Inquiry Act*[172] provides as follows:

> 14.—(2) Every report the commissioners make to the Lieutenant Governor in Council under this Part shall be laid before the Legislative Assembly within 15 days after the report is made, if the Legislative Assembly is then sitting, or if not, then within 15 days after the opening of the next session of the Legislative Assembly.

Section 10 of the New Brunswick *Inquiries Act*,[173] provides a mechanism for the report to be laid before the Lieutenant Governor in Council, but not necessarily before the Legislature.

Most provinces provide commissioners with the same protection from civil actions as enjoyed by superior court judges.[174] The New Brunswick *Inquiries Act*[175] provides that no action shall be brought against a commission by reason of acts purporting to be done in the capacity of a commissioner "unless it appears that the act was done by the commissioner without reasonable cause, and with actual malice, and wholly without jurisdiction".[176]

Finally, only the Quebec Act[177] attempts to deal with the issue of implementation of a commission's report. Section 6 of the Act states that once a commission has submitted its report, the government "shall order such action to be taken in the matter as shall be warranted by the evidence and report".

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171 *The Manitoba Evidence Act, supra*, note 121, s. 95.

172 *Supra*, note 120.

173 *Supra*, note 121, s. 10, as am. by S.N.B. 1978, c. D-11.2, s. 22.

174 See, for example, *The Manitoba Evidence Act, supra*, note 121, s. 87; the Quebec Act, *An Act respecting public inquiry commissions, supra*, note 128, s. 16; the Nova Scotia *Public Inquiries Act*, R.S.N.S. 1989, c. 372, s. 5 ; and the British Columbia *Inquiry Act, supra*, note 120, s. 12.

175 *Supra*, note 121.

176 *Ibid.*, s. 12.

177 *An Act respecting public inquiry commissions, supra*, note 128.

6. THE FEDERAL APPROACH IN CANADA

The present federal *Inquiries Act*[178] differs from those in the provinces by providing for the appointment of both public inquiries and departmental investigations. Part I of the Act, concerning the appointment of public inquiries, provides for the Governor in Council to appoint inquiries, whenever she deems it expedient to do so, "into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof".[179] Commissioners are granted the same power as a court of record in civil cases to enforce the attendance of witnesses and compel testimony and the production of documents.[180] These provisions are based on statutory provisions originating both before Confederation, in the pre-Confederation province of Canada, and shortly after Confederation.[181] However, in granting public inquiries the power to compel testimony and the production of documents, the first statutes also provided that no witness "shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution".[182] This privilege was latter abrogated when the *Canada Evidence Act* abolished the privilege against self-incrimination in exchange for immunity from the subsequent use of compelled testimony.[183]

Part II of the federal *Inquiries Act*,[184] which governs departmental investigations, allows a minister to appoint a commission "to investigate and report on the state and management of the business, or any part of the business, of such department, either in the inside or outside service thereof, and the conduct of any person in that service, so far as the same relates to the official duties of the person".[185] Departmental investigations are given the power to compel testimony and the production of documents,[186] as well as the power to enter any public office or institution.[187] Commissions appointed under Part II, unlike

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178 *Supra*, note 119.

179 *Ibid.*, s. 2.

180 *Ibid.*, ss. 4 and 5.

181 With respect to the legislative history, see Sellar, "A Century of Commissions of Inquiry" (1947), 25 Can. B. Rev. 1, and Law Reform Commission of Canada, *Administrative Law[:] Commissions of Inquiry*, Working Paper 17 (1977) (hereinafter referred to as "L.R.C.C. Working Paper"), at 7-11.

182 *An Act respecting Inquiries concerning Public Matters*, 1968, 31 Vict., c. 38 (Can.), s. 2.

183 See, now, *Canada Evidence Act*, *supra*, note 138, s. 5.

184 *Supra*, note 119.

185 *Ibid.*, s. 6.

186 *Ibid.*, s. 8.

187 *Ibid.*, s. 7.

those appointed under Part I,[188] do not have the same power to compel witnesses as is vested in any court of record in civil cases. Rather, every person who fails to testify "without valid excuse", or to produce documents, "is liable, on summary conviction before any police or stipendiary magistrate, or judge of a superior or county court...to a fine not exceeding four hundred dollars".[189] When it was first introduced in 1880,[190] Part II of the Act was actually more controversial than Part I, in large part because it was perceived by the opposition as abrogating the common law privilege against self-incrimination. For example, Edward Blake is reported to have argued that "there should not at any rate, be power to force the examination of the party charged"[191] and proposed an amendment "to preclude any commission appointed thereunder from inquiry into criminal matters".[192] In 1889, an amendment was introduced that specifically abrogated the common law privilege against self-incrimination, but provided that evidence taken before a provincial or federal inquiry was not admissible in criminal proceedings, except those arising out of perjury.[193]

Amendments in 1912[194] formed the basis for what is now Part III of the Act, which applies generally to both inquiries and departmental investigations. Under what is now section 11 of the *Inquiries Act*,[195] where the commissioners are authorized to do so by the commission issued in the case, they may appoint experts and counsel to assist the commission in its inquiry and may delegate to them the task of taking evidence. In 1912, what are now sections 12 and 13 of the *Inquiries Act*[196] were enacted in an attempt to provide fairness in the inquiry process. The present sections provide as follows:

> 12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.
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> 13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and

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188 *Ibid.*, s. 5.

189 *Ibid.*, s. 10(1).

190 *An Act to authorize making certain investigations under oath*, 1880, 43 Vict., c. 12 (Can.).

191 Sellar, *supra*, note 181, at 4.

192 *Ibid.*

193 *An Act to make further provision respecting inquiries concerning Public Matters*, 1889, 52 Vict., c. 33 (Can.).

194 *An Act to amend the Inquiries Act*, 1912, 2 Geo. V, c. 28 (Can.).

195 *Supra*, note 119.

196 *Ibid.*

> the person has been allowed full opportunity to be heard in person or by counsel.

It should be noted that these attempts to ensure fairness at inquiries are generally linked to the notion of a "charge" being made against a person in the inquiry process.

7. THE APPROACH OF THE LAW REFORM COMMISSION OF CANADA

As noted earlier in this report,[197] the Law Reform Commission of Canada (the "L.R.C.C.") conducted an important review of the federal *Public Inquiries Act* in the late 1970s. First, in a working paper[198] and later in its report,[199] the L.R.C.C. recommended a major reform of the federal Act centred on the distinction between inquiries exercising advisory, as opposed to investigative, functions. The federal Commission recognized that not all inquiries could be divided neatly between those that gather information about broad issues of policy and those that investigate the facts of alleged wrongdoing. The L.R.C.C. stated as follows:[200]

> Many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy.

Despite this recognition of the fact that there is often no clear division between investigatory and advisory functions, the L.R.C.C. recommended the establishment of separate regimes, in large part driven by a desire to minimize the use of coercive powers to compel testimony and the production of documents, which, the Commission believed, were necessary for investigatory commissions only.

The L.R.C.C. criticized the present federal *Inquiries Act*,[201] primarily on the grounds that it gave many commissions that formulated recommendations on broad policy matters coercive powers that they did not need.[202] Moreover,

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197 *Supra*, ch. 4, sec. 2(c).

198 L.R.C.C. Working Paper, *supra*, note 181.

199 Law Reform Commission of Canada, *Advisory and Investigatory Commissions*, Report 13 (1979) (hereinafter referred to as "L.R.C.C. Report").

200 L.R.C.C. Working Paper, *supra*, note 181, at 13.

201 *Supra*, note 119.

202 L.R.C.C. Working Paper, *supra*, note 181, at 28.

granting inquiries the same power to enforce the attendance of witnesses and compel them to give evidence "as is vested in any court of record in civil cases"[203] creates difficulties in not defining clearly the powers of inquiries and their limits.[204] The L.R.C.C. criticized Part II of the Act for allowing a single minister to appoint an inquiry with coercive investigatory powers. Instead, in its view, the decision should be for the Cabinet.[205] As will be seen, the Commission also criticized the present Act for not providing sufficient protections for witnesses, for not recognizing and encouraging the crucial role of publicity in an inquiry's deliberation, and for not attempting to protect the inquiry's independence from the executive.

Under their proposed Advisory and Investigatory Commissions Act,[206] the Governor General in Council would have to choose whether to appoint an advisory commission, which would have no coercive powers, or an investigatory commission, which would have (1) the power to compel testimony or the production of documents[207] (upon the threat of conviction of a summary conviction offence punishable by a fine not exceeding $1,000, imprisonment for a term not exceeding 6 months, or both[208]), (2) a right of access to public offices and public records,[209] and (3) the ability to obtain a search warrant from a judge.[210] In appointing an investigatory commission, the Cabinet would have to conclude that investigation was needed in a matter deemed "to be of substantial public importance",[211] whereas an advisory commission might be appointed to advise "on any matter relating to the good government of Canada".[212] Investigatory commissions would carry with them some additional safeguards for individuals. For example, section 24 of the Draft Act,[213] provides that "[a] person has the same privileges against disclosure of evidence given at a commission hearing and the subsequent use of such evidence as he would have if the evidence were given in a judicial proceeding". The L.R.C.C. would not grant a witness summoned to testify at a public inquiry the same right not to testify on grounds of self-incrimination that an accused has at a criminal trial. The Commission reasoned that the common law privilege had long been abandoned

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203 *Inquiries Act*, *supra*, note 119, s. 5.

204 L.R.C.C. Working Paper, *supra*, note 181, at 45.

205 *Ibid.*, at 46.

206 L.R.C.C. Report, *supra*, note 199, at 13 *et seq.* (hereinafter referred to as "Draft Act").

207 Draft Act, *ibid.*, s. 17.

208 *Ibid.*, s. 25.

209 *Ibid.*, s. 20.

210 *Ibid.*, s. 21.

211 *Ibid.*, s. 1(*b*).

212 *Ibid.*, s. 1(*a*).

213 *Ibid.*

and that such a privilege would inhibit thorough investigation of wrongdoing by public inquiries.[214]

Most of the other protections contained in the Draft Act[215] would apply to both types of commission. For example, witnesses before both advisory and investigatory commissions would have a right to be represented by counsel[216] and would have immunity from defamation actions for testimony given under oath and without malice.[217] In addition, any person who complains that testimony given before either type of commission may adversely affect her interests would have a right to be heard on such matters.[218] Specific notice of allegations of misconduct would be required, along with an opportunity to be heard in response to such allegations.[219] It should also be noted that advisory commissions would be given the right to apply to the Governor in Council to obtain any of the powers of an investigatory commission.[220]

Not all of the reforms proposed by the L.R.C.C. were related to the distinction between advisory and investigatory commissions, and the principles that commissions should not have unnecessary powers and that coercive powers should be used sparingly in matters of substantial public importance. The L.R.C.C. recognized that one of the fundamental attributes of all public inquiries is their independence and, in an attempt to protect their independence, recommended that each commission have a specific statutory power to engage the services of counsel, consultants, and support personnel.[221] The L.R.C.C. expressed the view that a commission should not be dependent for its funding on a department affected by its report, and that allocations should proceed through a central body such as the Privy Council.[222] Commissioners would be granted an absolute immunity from defamation actions in order to protect their independence in the same manner as superior court judges.[223] Perhaps the most significant

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214 L.R.C.C. Working Paper, *supra*, note 181, at 36. The L.R.C.C. added, at 36, as follows:

> [O]nce it has been accepted that commissions to investigate are desirable in certain circumstances, it is irrational to introduce protection for witnesses that will in many instances prevent meaningful investigation. An inquiry barred from examining wrongdoing that may lead to criminal prosecutions would have very little room for manoeuvre.

215 *Supra*, note 206.

216 *Ibid.*, s. 6.

217 *Ibid.*, s. 9.

218 *Ibid.*, s. 11.

219 *Ibid.*, s. 14.

220 *Ibid.*, s. 16.

221 *Ibid.*, s. 4.

222 L.R.C.C. Working Paper, *supra*, note 181, at 51.

223 Draft Act, *supra*, note 206, s. 8.

reform to protect the independence of inquiries was their proposal that "[a] commission shall submit its report to the Governor in Council and shall publish it within thirty days of its submission unless the Governor in Council otherwise directs".[224] This provision recognizes the importance of publication to the independence and integrity of a commission. However, it is open to question whether in contemplating situations in which publication should be delayed, the recommendation provides adequate safeguards against an executive trying to conceal a report that it views as prejudicial to its fortunes.

As well as attempting to recognize the importance of a commission's independence from the executive, the L.R.C.C. also tried to recognize the importance of public participation and publicity of its deliberations. Section 3 of the Draft Act[225] would require each commission to establish and publish its rules of practice and procedure. Commissions would have the discretion, "in order to promote the full expression of information and opinion", to pay any expenses or losses incurred by a person for the purpose of making representation.[226] A very broad right of standing to make representations would be given in advisory commissions to "anyone who satisfies the commission that he has a real interest in any matter relating to its mandate".[227] The Draft Act would require hearings to be held in public and open for reporting "without restriction" except in cases where the commission was satisfied that an *in camera* hearing or reporting restriction was justified because "considerations of public security, privacy of personal or financial matters, the right of anyone to a fair trial or any other reason outweigh the interest of the public in open hearings" or "in having hearings reported without restriction."[228]

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224 *Ibid.*, s. 13.

225 *Ibid.*

226 *Ibid.*, s. 7.

227 *Ibid.*, s. 15.

228 *Ibid.*, ss. 5 and 12.

CHAPTER 6

PROPOSALS FOR REFORM

1. RETENTION OF PUBLIC INQUIRIES

The first issue that must be resolved is whether public inquiries ought to be retained as an instrument of government. It might be argued that recent cases such as *Re Nelles and Grange*[1] and *Starr v. Houlden*[2] reveal the inherent unfairness of the inquiry process. There has been a long tradition of suspicion towards the powers of public inquiries to compel testimony and the production of evidence. The extraordinary powers contained in Part III of the *Public Inquiries Act*,[3] which enable a commission to apprehend and detain recalcitrant witnesses indeterminately,[4] and to search dwelling houses and seize evidence,[5] reveal the coercion behind "voluntary" compliance with a commission's summons. The admission into evidence of hearsay allegations, and the limited nature of the notice requirement in the case of a finding of misconduct,[6] threaten the reputational and other interests of individuals whose conduct will be examined in inquiries. Live television coverage of inquiries, and the lack of an appeal process from an inquiry's findings, may aggravate the prejudice suffered by affected individuals. Thus, it might be argued that public inquiries are anomalies in an Anglo-American legal system that relies on the protections of the adversary system and due process.

Even if the need is accepted for a public body with the power to compel testimony and the production of evidence, it might still be argued that, given recent restrictions placed on provincial public inquiries, the costs associated with the inquiry procedure—the prejudice suffered by individuals and the expense and delay incurred by the public—no longer outweigh its benefits. As discussed earlier in this report,[7] it is difficult to assess the degree of success or effectiveness of public inquiries, since the benefits of such inquiries tend to be

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1 (1984), 46 O.R. (2d) 210, 9 D.L.R. (4th) 79 (C.A.).

2 [1990] 1 S.C.R. 1366, 68 D.L.R.(4th) 641.

3 R.S.O. 1990, c. P.41.

4 *Ibid.*, s. 16.

5 *Ibid.*, s. 17.

6 *Ibid.*, s. 5.

7 *Supra*, ch. 1, sec. 6.

somewhat intangible. Moreover, whatever the benefits of public inquiries, it has been pointed out that there is "a high degree of cross-elasticity of supply among the principal types of inquiry. In some sense, all forms of inquiry are directed towards, and are able to achieve, an essentially similar result: the production after a period of time of a report or recommendation on a matter of policy."[8] Thus, if public inquiries were abolished, any resulting policy vacuum would be filled by the work of task forces, legislative committees, agencies, advisory bodies, and the civil service.

However compelling the above arguments might appear, in the view of the Commission they overstate the dangers of the inquiry process and underestimate their unique attributes as instruments of government. Although a public inquiry's power to compel testimony might be dangerous, the prejudice that would result from compulsory self-conscription is limited by the protections against the subsequent use of such testimony in section 9 of the *Public Inquiries Act*,[9] and by provisions in the Evidence Acts of both Ontario and Canada.[10] With the enactment of section 13 of the *Canadian Charter of Rights and Freedoms*,[11] this protection against subsequent use of compelled testimony is no longer subject to repeal by ordinary legislation. While it might be argued that individuals are still not protected adequately, in the view of the Commission the appropriate response to such a criticism is to devise better ways to protect individuals from self-incrimination in the inquiry process, not to dispense with an important instrument of government.

Although the power of public inquiries to demand the production of documents and other evidence does not create the same degree of concern as the power to compel testimony, it does raise difficulties of self-incrimination and unwarranted invasion of privacy. Once again, it might be argued that the powers currently possessed by commissions are overbroad, for example in authorizing a search of dwelling houses.[12] Nevertheless, as we have concluded above, the appropriate response to such criticism is to reform the present law to ensure that appropriate protections are available, rather than to abolish public inquiries.

Individuals whose conduct is examined by an inquiry might suffer prejudice. However, the prejudice that can be suffered as a result of an adverse

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8 Trebilcock, Hartle, Prichard and Dewees, *The Choice of Governing Instrument*, study prepared for the Economic Council of Canada (1982), at 38.

9 *Supra*, note 3.

10 See *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5, and *Evidence Act*, R.S.O. 1990, c. E.23, s. 9.

11 Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "Charter").

12 *Public Inquiries Act*, *supra*, note 3, s. 17(2).

finding in a commission's report is mitigated somewhat by the holding in *Re Nelles and Grange*,[13] that, in effect, a commission should not "name names" or express conclusions of civil and criminal liability, and by the provision in section 5(2) of the present Act[14] that "[n]o finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel". Moreover, as we examined earlier in this report,[15] the courts may well intervene, on division of powers grounds, to invalidate inquiries that are focused on the investigation of the criminal conduct of specific individuals.

It is important to acknowledge that it might well be impossible to abolish public inquiries. Repeal of the legislative framework might result simply in an unregulated exercise of the prerogative power to establish similar institutions. It would be better, in the Commission's view, to reform the statutory and policy framework that governs the appointment of inquiries, rather than to allow governments to fashion similar institutions in an *ad hoc* manner, and often in times of crisis. Moreover, it should be remembered that legislative committees, which are one of the alternatives to public inquiries, possess similar coercive powers with even fewer safeguards than are currently provided under the *Public Inquiries Act*.[16]

As has been illustrated earlier in this report,[17] it would not be wise, in our view, to dismiss the value of public inquiries casually or on a cynical basis. In some instances, public inquiries have led to tangible reforms. At the federal level, one need only think of the development of medicare in the wake of the Hall Report.[18] Tangible reforms have not only been produced by policy and research oriented commissions; the report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police[19] not only

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13 *Supra*, note 1.

14 *Public Inquiries Act*, *supra*, note 3.

15 *Supra*, ch. 3, sec. 1(c)(i).

16 Legislative committees would still retain the power to compel testimony and the production of evidence. See *Legislative Assembly Act*, R.S.O. 1990, c. L.10, s. 46. As to the ability of the Legislature to hold in contempt witnesses who refuse to obey its committees, see Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees* (1981), at 45 *et seq*. It will be recalled that, in the case of public inquiries, punishment for contempt is imposed by the Divisional Court, not by the commission itself. See *Public Inquiries Act*, *supra*, note 3, s. 8.

17 See the discussion of the history and policy role of public inquiries, *supra*, ch. 1.

18 Canada, *Royal Commission on Health Services* (1964-65).

19 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1980-81).

revealed improprieties by members of Canada's security service, but laid the basis for introduction of a civilian intelligence service and a sophisticated and innovative supervisory mechanism.

As was stressed in chapter 2, it is important not to evaluate the effectiveness of public inquiries solely in terms of legislative implementation. It has been observed that "arriving at 'an answer' will commonly be just one of the numerous objectives of the inquiry; others include the processing of values, delay, deferral, education, persuasion, participation and the like".[20] Indeed, one of the most important roles of large-scale public inquiries is their social function.[21] Part of this social function is to help restore faith in the integrity of government and to influence the attitudes and opinions of both policy-makers and citizens.

Public inquiries possess a number of unique attributes that make them an attractive instrument of government. First, public inquiries are unique in the independence they enjoy, once they have been appointed, from the executive and legislative branches of government. This attribute is particularly important in view of the current climate of suspicion and malaise over the functioning of the ordinary instruments of governments. In an era in which Canada is turning increasingly to the courts for solutions to many matters of public policy, it would be ironic if we were to eliminate an institution of government that shares the judiciary's independence, but is not limited by its adversarial process. The public inquiry process allows for the appointment of respected and impartial decision-makers, who need not be judges. These individuals are given powers and resources to investigate and formulate policy recommendations on the basis of their findings. The independence of public inquiries stands in contrast to the hierarchical structure of the civil service, and the effect of party discipline and partisan considerations in legislative committees. Agencies and advisory boards have some capacity for independence, but it is not as great as that of *ad hoc* public inquiries. Public inquiries are unique in that they enter a policy field for a limited period in time only; they can be appointed to have no vested or continuing interests in their subject matter. The value of having highly respected individuals devote their time temporarily as commissioners should not be ignored in an era characterized by its suspicion of politicians and the permanent civil service.

The second attribute of public inquiries is that they facilitate broad public participation. This is particularly important since people appear to be increasingly disillusioned and suspicious of forums that do not foster public participation. The role played by the public in public inquiries varies greatly, but

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20 Trebilcock, Hartle, Prichard and Dewees, *supra*, note 8, at 45.

21 Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Ziegel (ed.), *Law and Social Change* (1973) 79.

it is possible to encourage and even mandate public participation. Not every commission can or will follow its example, but the inquiry into the Mackenzie Valley Pipeline[22] has set the standard for innovative use of broad public participation in the inquiry process.

Related to the participation question is the ability of governments, through the appointment of commissioners, to shape the political dynamic of an inquiry. In some instances it might be appropriate to appoint a commissioner who is valued for her impartiality by all those whose interests are affected. In other instances, it might be appropriate to appoint a number of commissioners who represent the various individuals or groups whose interests are affected. Whatever particular political dynamic is promoted, much can be gained by going outside and avoiding the limits set by the composition and character of existing legislative committees, advisory bodies, or the civil service.

While some public inquiries have been effective, other have not. As with any other type of inquiry, some public inquiries have been slow, wasteful and ineffective. In the view of the Commission, attempts should be made to learn from successful inquiries in order to increase the efficiency and efficacy of all inquiries. Although the legislative and policy framework surrounding public inquiries cannot guarantee that inquiries will always be efficient and effective, we believe that certain improvements can be made.

The Commission has concluded that it would not be desirable to abolish public inquiries, despite their potential for causing prejudice to the individuals who are affected by an inquiry's coercive powers and public proceedings. The recommendations that follow will be based on four principles that have emerged from our decision to advocate retention of public inquiries. First, since public inquiries are an important and distinctive policy instrument, at least in part because once they have been appointed they are independent from the executive and Legislature, their independence should be protected. Second, because public inquiries possess coercive inquisitorial powers, the prejudice suffered by affected individuals should be minimized. Third, public inquiries should facilitate public involvement. Fourth, attempts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence, and participation. Accordingly, the Commission recommends that the conduct of public inquiries should be guided by the following principles:

(a) The independence of public inquiries from the executive and the Legislature should be recognized and protected;

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22 See Canada, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (1977).

(b) The prejudice suffered by individuals affected by public inquiries should be minimized;

(c) Public inquiries should facilitate public involvement; and

(d) Efforts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence, and participation.

We now turn to consider the options for reform of public inquiries, in light of these four principles.

2. THE CLASSIFICATION OF PUBLIC INQUIRIES: "ADVISORY" AND "INVESTIGATORY" INQUIRIES

The notion that "advisory" inquiries do not require coercive powers because of their orientation toward broad policy issues, whereas "investigatory" inquiries do require such powers, has been discussed thoroughly above.[23] The attempt by the Law Reform Commission of Canada (the "L.R.C.C.") to implement this notion in draft legislation has also been discussed.[24] As with any attempt to categorize a complex phenomenon, the advisory/investigatory dichotomy has a number of inherent difficulties. For example, at times it is difficult to know whether an inquiry is concerned primarily with broad policy matters or the investigation of specific events. Moreover, many inquiries perform both functions, and there is evidence to suggest that such inquiries might be more effective for combining a retrospective investigation of past events with a prospective search for the best policies.

A significant difficulty associated with the advisory/investigatory distinction is that it mirrors the distinction between "administrative" and "quasi-judicial" functions that was the dominant vehicle for determining the scope of judicial review at the time the L.R.C.C. issued its working paper[25] and report.[26] Under this approach to judicial review, the work of an "advisory" commission would be classified as "administrative" and thus subject to the most limited and deferential form of judicial review. "Investigatory" inquiries, on the other hand, would be subject to a more searching form of judicial review on the basis that

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23 *Supra*, ch. 4, secs. 2(c) and 3.

24 *Supra*, ch. 5, sec. 7.

25 Law Reform Commission of Canada, *Commissions of Inquiry*, Working Paper 17 (1977) (hereinafter referred to as "L.R.C.C. Working Paper").

26 Law Reform Commission of Canada, *Advisory and Investigatory Commissions*, Report 13 (1979) (hereinafter referred to as "L.R.C.C. Report").

they exercised "quasi-judicial" functions, which affect the rights and interests of individuals.

Starting in the year that the L.R.C.C. Report[27] was issued, Canadian courts have rejected the administrative/quasi-judicial distinction as determinative of the scope of judicial review, and have recognized that the government has a duty to act fairly to individuals in the exercise of all of its functions.[28] In our view, every inquiry should have investigatory powers available, whether or not it chooses to exercise them, and every inquiry should be bound by protections for individuals, whether or not they are applicable.

As was discussed in chapter 4, many inquiries engage in the retrospective investigation and assessment of past events as a necessary prelude to formulating preventive policies for the future. Moreover, the mere fact that an inquiry does not exercise its coercive powers does not mean that the existence of such powers was not an important factor in gaining the co-operation of affected interests. A legislative scheme that relies on the distinction between advisory and investigatory inquiries might sacrifice the effectiveness of advisory inquiries, which might be frustrated when affected interests refuse to co-operate with its work by providing information. A commission faced with such a lack of co-operation, under the L.R.C.C.'s proposals, would have to go back to Cabinet to request additional powers that might or might not be granted. In our opinion, this would compromise the independence of the inquiry which, as we have seen, is one of an inquiry's most distinctive and important attributes.

In the Commission's view, it would not be wise to create two separate classes of inquiry, one with coercive powers and one without. It would often be difficult to determine, at the outset, whether an inquiry would require coercive powers. If governments were to choose to appoint some inquiries without coercive powers, such inquiries might find their work frustrated by a refusal of affected interests to co-operate in providing information. The very existence of coercive powers, even if they are never exercised, may be vital in obtaining information. Moreover requests by a commission to have the Cabinet grant it coercive powers after its appointment might well compromise the independence of its operation that we think is essential. Should governments want to appoint advisory bodies without coercive powers—for example, as we discussed in chapter 4, because they might be less vulnerable to constitutional review on the grounds of both the Charter[29] and the division of powers—they can continue the present practice of appointing task forces and advisory bodies outside of the

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27 *Ibid.*

28 *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

29 *Supra*, note 11.

Public Inquiries Act.[30] Accordingly, the Commission recommends that all inquiries should have the same range of powers available, but an inquiry need not use all the powers available if it considers any of them to be inappropriate to the nature of the inquiry.

3. FAIRNESS AND PUBLIC INQUIRIES

Public inquiries exercise many powers that can affect individuals prejudicially. As we discussed in chapter 2, the last major reform of Ontario's *Public Inquiries Act*[31] was undertaken, in large part, to provide additional protections for individuals. These included the right to notice of wrongdoing and the right to have a refusal to obey a summons adjudicated in a court of law through the stated case procedure.[32] As important as these reforms were, there are others that, in our view, should be made. The challenge is not so much to devise additional safeguards, but rather to assess whether their implementation would compromise the effectiveness of the public inquiry unduly as a legitimate policy instrument.

(a) SELF-INCRIMINATION

Many problems of self-incrimination are created when an individual who may be faced with a subsequent prosecution is forced by a public inquiry to testify or produce evidence. One commentator has observed as follows:[33]

> [Public inquiries are] subject to the criticism that they permit "through the back door" what the criminal process, itself, does not. A suspect may be compelled to testify and thereby to provide the very basis for an accusation against himself. He might also be required to assist the state in preparing its case against him by producing documents, revealing the names of witnesses and providing other information. There is a third potential criticism. The publicity given to the witness's testimony at the earlier proceeding may make it extremely difficult to ensure fairness and impartiality at the subsequent criminal trial.

At present the Act purports to grant individuals who testify at a public inquiry immunity from the use of answers given at an inquiry in any subsequent proceedings against them, except in prosecutions for perjury in giving such

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30 *Supra*, note 3.

31 *Ibid.*

32 See, now, *Public Inquiries Act*, *ibid.*, ss. 5 and 8, respectively.

33 Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979), at 349.

evidence.[34] As discussed earlier in this report,[35] this provision might be vulnerable on division of powers grounds, to the extent that it attempts to regulate the admissibility of evidence in criminal proceedings. Because section 13 of the Charter provides similar use immunity protections,[36] the Charter now provides minimum safeguards in proceedings governed by either federal or provincial law. Section 13 also provides an exception, allowing evidence to be used in subsequent proceedings "in a prosecution for perjury or for the giving of contradictory evidence".

Although the Charter provides a salutary minimum, the Commission has concluded that it should be stated clearly that the law of Ontario goes beyond section 13 of the Charter, and prevents the use of testimony given at an inquiry for any purpose in subsequent proceedings, not merely use in the prosecution's case in chief. In our view, Ontario law should not adopt the recent limitations placed on the protections of section 13 of the Charter by the Supreme Court of Canada.[37] Even the subsequent use of testimony that an individual is compelled to provide at a public inquiry for collateral purposes at trial, such as cross-examination, will prejudice an individual unfairly. This is particularly so because, when an individual testifies at a public inquiry, she might not know the case to be met, at least not to the same extent as in a criminal prosecution.

One possible exception might be to allow testimony given before a public inquiry to be admissible in subsequent disciplinary hearings governed by Ontario law. Such an exception would recognize the public interest in obtaining full information about the behaviour of licensed professionals, such as doctors and lawyers. On balance, however, we have concluded that testimony compelled at a public inquiry should not be admissible, even in disciplinary proceedings. In many cases, the licensed professional might be compelled to testify at the disciplinary proceeding where he will have a much better opportunity to know the case to be met. Moreover, in light of the recommendation we will make below to grant individuals a statutory right to refuse to testify at public inquiries, we believe that those who choose to decline to exercise such a right or who are exempted from that right, should be protected as much as possible from any prejudice that might result from testimony compelled at a public inquiry. Accordingly, the Commission recommends that sworn testimony given by a witness at an inquiry should not be admissible for any purpose in subsequent proceedings governed by Ontario law.

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34 *Public Inquiries Act*, *supra*, note 3, s. 9.

35 *Supra*, ch. 3, sec. 1(e).

36 Section 13 of the Charter, *supra*, note 11, is discussed *supra*, ch. 3, sec. 2(c).

37 *R. v. Kuldip*, [1991] 3 S.C.R. 618, 61 C.C.C. (3d) 385.

Another reform that should be implemented, in our view, is the addition of a provision to the effect that a commission cannot compel a person to give testimony or produce evidence with respect to the subject matter of a charge that has been laid against that person and has not been finally disposed of. As discussed in chapter 3, this would rationalize public inquiries with the constitutional limits that have long been placed on coroner's inquests.[38] Moreover, the courts might well require this result under section 7 of the Charter,[39] or on the basis that a public inquiry's examination of an accused person constitutes an abuse of process. In our view, it is best that this principle be clearly embodied in legislation to guide commissions and to prevent the need to resort to such remedies.

An analogous provision in the Australian Commonwealth legislation might form an appropriate model for reform. As discussed earlier in this report,[40] the Australian legislation provides that the general section granting powers to compel testimony and the production of evidence "does not apply where the offence in respect of which the production of a document or other thing or the answer to a question might tend to incriminate a person is an offence with which the person has been charged and the charge has not been finally dealt with by a court or otherwise disposed of".[41] Accordingly, the Commission recommends that no person should be summoned by an inquiry to testify or produce evidence about any subject matter in relation to which an information has been laid against that person and has not been finally disposed of.

As discussed in chapter 3, it might be desirable to define "charged" broadly to include a person against whom an information has been laid or compulsory attendance process exercised. However, irrespective of how broadly a person charged with an offence is defined, one is still left with the self-incrimination problems presented when a public inquiry compels a person suspected of wrongdoing to testify. There are several options available, ranging from granting all persons subject to an inquiry's coercive processes the right to refuse to testify or produce evidence on the grounds that it may incriminate them, to leaving the Act as it is and allowing suspects to argue in the subsequent proceedings, should

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38 *Batary v. The Attorney General for Saskatchewan*, [1965] S.C.R. 465, 52 D.L.R. (2d) 125.

39 Section 7 of the Charter, *supra*, note 11, is discussed *supra*, ch. 3, sec. 2(d).

40 *Supra*, ch. 5, sec. 3

41 *Royal Commissions Act 1902*, No. 12 (Aust.), s. 6A(3), as en. by 1982, No. 139 (Aust.), s. 6. One commentator has suggested an amendment to the following effect: "A witness who has been charged with a criminal offence, for which a verdict has not been rendered, shall be excused from answering any question, at any proceeding other than his trial on such a charge, on the ground that his answer may tend to incriminate him of the charge." See Ratushny, *supra*, note 33, at 393.

they emerge, that evidence or information derived from compelled testimony or evidence should not be admissible in those proceedings.

The case for granting individuals the right to refuse to testify at an inquiry is stronger than that for granting individuals the right to refuse to produce evidence. Although the resulting self-incrimination is similar, our legal system has always abhorred the notion that a person should be compelled to testify against himself, while accepting the seizure of evidence by public officials, even when that evidence is incriminating and leads to the discovery of other incriminatory evidence. To give all individuals a statutory right to refuse to produce documents and other evidence would, in our view, hinder the activities of public inquiries unduly. Moreover, such a right is not necessary to ensure fairness to affected individuals. This does not mean, however, that the powers contained in section 7 of the *Public Inquiries Act*, which allows a commission to compel the production of any "documents and things" "relevant to the subject-matter of the inquiry", strikes the appropriate balance between the public's interests in full investigation and the individual's interest in privacy. This will be discussed in a subsequent below.

A statutory right to refuse to testify at a public inquiry would avoid jurisdictional and definitional problems when attempting to ensure that a suspect is not prejudiced in subsequent proceedings (including criminal prosecutions) by the introduction of the "fruits" of the testimony. We recognize that the ability of a witness summoned before a public inquiry to refuse to testify is a significant innovation and has the potential to frustrate the inquiry. Nevertheless, an inquiry that is properly examining policy in a field of provincial jurisdiction should not be completely frustrated by a refusal of a witness to testify. Any less drastic approach would mean that the derivative use of testimony compelled at a public inquiry would be left in a state of uncertainty. As was discussed in chapter 3, evidence derived directly from such testimony, and not otherwise discoverable, might well be inadmissible in subsequent proceedings. Even evidence that is derived more indirectly from testimony compelled at a public inquiry might be inadmissible.

One possible exception to a statutory right to refuse to testify would concern an inquiry into the official activities of individuals employed by a provincial or municipal government. The case of *O'Hara v. British Columbia*[42] affirms that a provincial inquiry can validly investigate specific incidents such as the conduct of police officers or correctional authorities. Therefore, consideration should be given to creating an exemption from the right to refuse to testify, and require that government employees must testify with regard to the execution of their official duties. This testimony, of course, would still be inadmissible in

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42 [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527.

subsequent proceedings by virtue of section 13 of the Charter,[43] as well as provisions in the Evidence Acts of Canada and Ontario.[44] Moreover, the recommendation made above would make it clear that an official's testimony could not be used for any purpose in a subsequent proceeding governed by Ontario law. The admissibility in subsequent proceedings of evidence derived from such testimony could be decided at those subsequent proceedings on a case by case basis, as is contemplated by LaForest and L'Heureux-Dubé JJ. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Division)*.[45] An attempt to legislate that this derivative evidence would be inadmissible would run into the problems of defining derivative evidence discussed in chapter 3. Moreover, Ontario legislation could not affect admissibility of such evidence in criminal proceedings.

Although an exception for public officials would allow detailed examination of instances of governmental misfeasance, it would still be unconstitutional to compel a public official to testify in a situation in which an inquiry is constituted primarily as a substitute for the criminal process. As discussed earlier in this report,[46] a Saskatchewan inquiry into the wrongdoing of officers of a Crown corporation was ruled invalid as an invasion of federal jurisdiction.[47] Matheson J. held that, although a "province possesses not only the authority, but a duty, to investigate questionable activities of its own public officials" the inquiry should be disallowed nevertheless if its dominant purpose was to investigate an alleged criminal offence and force a suspect to testify.[48] He noted that the Supreme Court of Canada had made specific mention of the fact that the persons named in the terms of reference of the inquiry struck down in *Starr v. Houlden*[49] were private individuals, not public officials, but concluded that the fact that public officials (senior officials of a Crown corporation) were being investigated did not save the Saskatchewan inquiry.[50] Although compelling public officials to testify about the execution of their official duties can be justified as necessary to improve the good government of the province,

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43 *Supra*, note 11.

44 *Supra*, note 10.

45 [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161.

46 *Supra*, ch. 3, sec. 1(c)(i)b(8).

47 *Castle v. Brownridge*, [1990] 6 W.W.R. 354 (Sask. Q.B.).

48 *Ibid.*, at 365.

49 *Supra*, note 2.

50 It should be recalled, however, that there had already been indictments issued in the United States, that the Royal Canadian Mounted Police were conducting an ongoing fraud investigation and had executed search warrants, and that the inquiry's terms of reference were directed solely at examining allegations concerning one incident of wrongdoing and did not mandate the commission to make preventive policy recommendations.

such officials must not be compelled to testify if they are suspects in a criminal investigation and if the inquiry is focused on matters that might be the basis of a subsequent criminal prosecution.

Another exception to the statutory right to refuse to testify is to allow an inquiry to compel testimony if the appropriate prosecuting authority has granted immunity from prosecution concerning the subject matter of the testimony. Such immunity would have to be granted on a case by case basis by the appropriate prosecuting authorities.[51] Once the possibility of subsequent prosecution is removed, much of the unfairness of requiring a person to testify diminishes. The individual might still have some legitimate interests in not disclosing certain matters in public, but such prejudice could be minimized by provisions providing for the taking of evidence in private in appropriate circumstances.

It should be noted that, under our recommendations, it would be possible to compel a person to testify at a public inquiry if the person is granted immunity from a subsequent prosecution under the *Criminal Code*[52] or some other regulatory or disciplinary offence. A person who is compelled to testify might be sued civilly for any matter revealed in the subject matter of the testimony. In our view, however, subsequent criminal or quasi-criminal prosecutions impose the most unfairness on individuals, and not civil proceedings. We have concluded, therefore, that no immunity from subsequent civil proceedings should be granted.

Granting a statutory right to refuse to testify would move public inquiries closer to the position in the United States. As discussed earlier in this report,[53] the Fifth Amendment of the American Bill of Rights[54] has been interpreted to allow individuals to refuse to testify on the grounds that their testimony might incriminate them. Following the American example, our proposal would allow the right to refuse to testify to be displaced by a grant of immunity from prosecution. In our view, immunity from prosecution is a better solution than trying to ensure that the testimony is not used, directly or indirectly, in subsequent prosecutions. As discussed above, an attempt to regulate permissible derivative evidence would create formidable problems. Not only would there be a difficulty in defining derivative evidence, but there would be jurisdictional difficulties created by Ontario's inability to legislate in relation to the admissibility of evidence in criminal proceedings.

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51 On the mechanics and jurisdictional implications of granting immunity, see Ratushny, *supra*, note 33, at 400 *et seq*.

52 R.S.C. 1985, c. C-46.

53 *Supra*, ch. 5, sec. 1.

54 Being Amendments I to X, XIII to XV, XIX, XXIV and XXVI to the Constitution.

We recognize that a right to refuse to testify would introduce a new element of uncertainty in the operation of public inquiries, and may frustrate their work when the two proposed exceptions are not met. Nevertheless, we believe that this is the most effective means of protecting individuals from self-incrimination. As a policy matter, it makes clear that, in light of the Charter[55] and decisions such as *Starr v. Houlden*,[56] governments will in some cases have to choose between conducting a public inquiry and pursuing subsequent prosecutions. Our proposals allows this choice to be made.

In one important respect our proposals for reform would not go as far as the American example. We propose a significant exception to the statutory right to refuse to testify that would allow public officials to be compelled to testify with respect to the exercise of their official duties. It might be argued that this exception creates unfairness in treating public officials more harshly than other individuals. It should be noted, however, that public officials are treated more harshly not as a class of individuals, but only in respect to the execution of their official duties. The public's interest in using public inquiries to investigate matters "affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein" is recognized in section 2 of the *Public Inquiries Act*[57] and, subject to the Charter, has been recognized in recent decisions such as *O'Hara v. British Columbia*.[58] Public officials who are required to testify about their official duties would not be left without protections against the subsequent use of their testimony or Charter remedies in subsequent proceedings; they would be denied only a statutory right designed to prevent any possibility of self-incrimination in subsequent proceedings. The Commission therefore recommends that everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her. However, the right to refuse to testify should not be available to anyone being asked to testify about the execution of official governmental duties or to any person who has received from the proper prosecutorial authorities a grant of immunity from prosecution about the subject matter of the testimony.

A different balance of interests applies when a commission demands the production of documents or other things as opposed to demanding that a person testify. On the one hand, the commission's interests in investigating will usually be more substantial than when it wishes to make a person testify. Documents and other things will often be the only tangible and most reliable evidence. Similarly, the individual's interest in protection against self-

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55 *Supra*, note 11.

56 *Supra*, note 2.

57 *Supra*, note 3.

58 *Supra*, note 42.

incrimination will not be as great when a person is forced to produce documents or other things already in existence. Whatever the case for including the production of documents and other evidence in common law or Charter understandings of the right against self-incrimination, it is clear that our courts consider the admission of the product of self-conscription a more serious matter than the admission of tangible evidence that existed before a person was compelled to testify.[59] In short, there is reason to believe that giving individuals a statutory right to refuse to produce evidence would impair significantly the ability of many inquiries to conduct thorough and accurate investigations. Moreover, in our view, such a right would not be necessary to protect individuals against unfair self-incrimination.

This conclusion does not mean that a commission's power to compel the production of evidence should not be reformed. It would be possible, for example, to require that the evidence to be produced be more than simply relevant to the subject matter of the inquiry, as is required under section 7 of the present Act.[60] A stricter standard requiring that the evidence be material to the subject matter of the inquiry could be introduced. The problem with this proposal is that it would often be difficult, particularly in the early stages of its investigative work, for a commission to demonstrate that every document it demands is material. Relevancy is not an empty concept; the commission must be prepared to demonstrate that the evidence relates to a matter within the commission's mandate.

Another possible reform would be to require prior judicial authorization before a commission compels the production of any document or other thing. Following the decision in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Division)*,[61] prior judicial authorization is not likely required as a matter of constitutional law. The subsequent judicial review procedure contemplated under section 8 of the present Act[62] is likely sufficient. It allows a person who has disobeyed a summons from a commission to argue before the Divisional Court that she has a "lawful excuse". This procedure, in our view, should be retained, as it allows claims of lawful excuse to be adjudicated independently. It should be made clear, however, that it is a lawful excuse to refuse to produce documents and things over which there is a high expectation of privacy and that are not material to the mandate of the commission.

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59 *R. v. Collins*, [1987] S.C.R. 5, 13 B.C.L.R. (2d) 1.

60 *Public Inquiries Act*, *supra*, note 3.

61 *Supra*, note 45.

62 *Public Inquiries Act*, *supra*, note 3.

Another alternative would be to limit the power to require the production of documents and other things to those that are present in public offices and public records. This type of limitation is contemplated in both the *Manitoba Evidence Act*[63] and the Alberta *Public Inquiries Act*,[64]discussed above.[65] Just as public employees and officials could be exempted from a new statutory right to refuse to testify, documents in public offices or public records could be exempted from statutory restrictions on the production of evidence. On the other hand, there might be some information in the public domain that should be protected against disclosure, and there might be some documents or other things outside of public offices to which a commission should have access. We have concluded that it would be better to have the need for the evidence and the countervailing privacy interests addressed directly by the commission in the first instance, without formulating an imprecise and inevitably under- and over-inclusive distinction between evidence in public offices and other evidence.

We have concluded, therefore, that an inquiry should continue to be able to compel the production of documents and other things relevant to its mandate. However, we recommend that a lawful excuse for a refusal to produce any document or thing in a person's power or control should include circumstances in which the person's right of privacy outweighs the commission's interest in their production.

We now turn to consider the enforcement powers that should be available to a commission where a person refuses, without a lawful excuse, to testify or produce evidence. As discussed in chapter 2, an important feature of the 1971 reforms,[66] based on the recommendations of the *Royal Commission Inquiry into Civil Rights*,[67] was the enactment of what is now section 8 of the Act. This section ensures that the Divisional Court, not the commission, has the power to "punish or take steps for the punishment of [the] person in like manner as if he or she had been guilty of contempt of the court".[68] This provision for a judicial determination of, among other matters, what constitutes a "lawful excuse" for a refusal to obey a commission's summons, is an important safeguard and, in the opinion of the Commission, it should be retained.

As we have stated, section 8 of the *Public Inquiries Act* provides for the punishment of a recalcitrant witness "in like manner as if he or she had been

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63 R.S.M. 1987, c. E150, s. 94.

64 R.S.A. 1980, c. P-29, s. 8(4).

65 *Supra*, ch. 5, sec. 5.

66 *Public Inquiries Act, 1971*, S.O. 1971, c. 49.

67 Ontario, *Royal Commission Inquiry into Civil Rights* (1968) (hereinafter referred to as the "McRuer Report").

68 *Public Inquiries Act*, *supra*, note 3, s. 8.

guilty of contempt of court". It would appear, therefore, that the Divisional Court has the power to detain such a witness indefinitely. It might be argued that such a power is not appropriate, even for the Divisional Court. As we noted in chapter 5, in a number of other jurisdictions a refusal to comply with a commission's summons is not punished as if it were contempt; rather such a refusal is made an offence, subject to a maximum fine and period of imprisonment. This reform, in our view, would not necessarily minimize coercion, since the exercise of the contempt power allows for a gradual imposition of punishment. Moreover, the punishment might be stopped at any time, should the person decide to obey the commission's summons. We have also concluded that replacing the present contempt power with a summary conviction offence would be less expeditious and effective in forcing a witness to comply with an inquiry's order. Thus, in our view, it would be appropriate to retain the power of the Divisional Court to punish a refusal to obey an inquiry's summons or to testify, without a lawful excuse, as if it were contempt of court.

(b) POWERS UNDER PART III OF THE *PUBLIC INQUIRIES ACT*: APPREHENSION AND DETENTION OF WITNESSES, AND SEARCH AND SEIZURE OF DOCUMENTS AND OTHER EVIDENCE

The power in section 16 of the *Public Inquiries Act*[69] allowing a commission, upon judicial authorization, to apprehend and detain a recalcitrant witness whose presence is material to the achievement of the purposes of the inquiry clearly stands in tension to our earlier recommendations that would allow certain individuals to refuse to testify. We have concluded, therefore, that the powers contained in section 16 of the Act should be abolished. A refusal to testify without a lawful excuse could still be punished by the Divisional Court as if it were contempt, but we would not expect the power to detain to be exercised indefinitely in order to force a witness to testify. Accordingly, the Commission recommends that the power contained in section 16 of the *Public Inquiries Act* to apprehend and detain a person who has failed to attend at a public inquiry in accordance with the requirements of a summons should be abolished.

Under section 17(2) of the Act, a search warrant is available where "there are reasonable grounds for believing that there are in any building, receptacle or place, including a dwelling house, any documents or things relevant to the subject-matter of the inquiry". This extraordinary power, in our view, should be related to a showing that the evidence is material to the achievement of the purposes of the inquiry, not merely relevant. Moreover, the issuing judge should

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[69] *Ibid.*

be instructed clearly to consider the privacy interests of individuals in retaining documents and other things.

There is some question whether the structure of Part III should be retained. At present, the powers in Part III apply only if the Lieutenant Governor in Council so designates.[70] As we noted in chapter 2, these powers have been extended to only eight of thirty inquiries appointed between 1975 and 1990. Thus, the present structure helps to minimize the coercive powers that are available to a public inquiry. However, by making it more difficult to obtain a search warrant for documents and other things our proposals make it possible to have a general provision that will enable all inquiries to obtain a search warrant. It should be clear, however, that obtaining and executing a search warrant is a drastic remedy of last measure. Thus, one of the grounds for issuing the warrant should be that there are reasonable grounds to believe that the documents or things will not be produced before the commission in full and accurate condition if reliance is placed on the commission's power to summons the production of such evidence. The present powers under section 17(4) and (5) of the Act, governing return of documents and things within a reasonable time and taking photocopies, should be retained.

The Commission therefore recommends that, upon the application of an inquiry, a judge of the Ontario Court (General Division) should be permitted to issue a warrant authorizing a search for any documents or things only upon showing that

(a) the documents and things are material to the subject matter of the inquiry;

(b) the public interest in obtaining access to such documents and things clearly outweighs the privacy interests of the individual; and

(c) there are reasonable grounds to believe that such documents or things will not be produced before the commission in a full and accurate condition through reliance on the commission's power to summon the production of such evidence.

(c) NOTICE RIGHTS

Section 5(2) of the *Public Inquiries Act*[71] provides that no finding of misconduct shall be made in a commission's report "unless that person had

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70 *Public Inquiries Act*, *ibid.*, s. 15.

71 *Ibid.*

reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel". This provision protects only individuals who will be criticized in a commission's final report. Following the decision in *Re Nelles and Grange*,[72] however, a provincial commission will not be able to reach any conclusion of civil or criminal liability and, as in that case, may be precluded from identifying persons who deliberately or negligently committed wrongful acts. Thus, it appears that, by focusing on conclusions in a commission's report, section 5(2) applies to only a subset of possible findings, that is, those findings of misconduct that are permissible to a provincial inquiry. Given the restrictions on how far a provincial inquiry can now go in making findings of misconduct, it can be argued that section 5(2) has a somewhat misdirected focus.

In our view, it is appropriate to have the commission give notice not only to individuals who will be found to have engaged in misconduct in any report of a commission, but to those who will face serious allegations of misconduct on the part of any witness in a commission's public proceedings. This recognizes the prejudice that a person might suffer by being commented upon adversely in public proceedings, even though such comments might be rejected or ignored in the commission's report. This expanded notice right is important to ensure fairness in the public inquiry process, but it must be made workable. It will be recalled[73] that the Salmon Commission[74] proposed a similar notice requirement, to the effect that, before a person would be compelled to testify, the person "should be informed of any allegations which are made against him and the substance of the evidence in support of them".[75] In a White Paper[76] in response to the Salmon Commission's proposals, the government accepted the notice principle but noted that it "raises a number of difficult issues in practice".[77] It stated that it might be impossible to identify at an early stage the allegations made, and stressed that each commission must retain the discretion not to give

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72 *Supra*, note 1.

73 See *supra*, ch. 5, sec. 2.

74 United Kingdom, Royal Commission on Tribunals of Inquiry, *Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon* (Cmnd. 3121, 1966) (hereinafter referred to as the "Salmon Commission Report").

75 *Ibid.*, at 17. This proposal, however, protects only a person called as a witness. In our view, this is too narrow since a person who is not called as a witness may still suffer from allegations made at a public inquiry. This is especially so if, following our recommendations, some people would have a statutory right not to be forced to testify at a public inquiry.

76 United Kingdom, *Tribunals of Inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921[:] Government views on the Recommendations of the Royal Commission on Tribunals of Inquiry and the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry* (Cmnd. 5313, 1973).

77 *Ibid.*, at 10.

notice of extraneous evidence. We agree that it is important that each commission have a discretion not to give notice if it concludes either that the allegations are frivolous and will not be the focus of public discussion or that they do not amount to an allegation of misconduct.

We now turn to consider the rights that should be granted to a person who has received notice of allegations of misconduct. It should be noted that the notice of an allegation of misconduct is triggered when a person will face such allegations in public proceedings of an inquiry. An inquiry that chooses not to have public hearings will not have to give notice of allegations and those that do will already have decided that public hearings are an important part of their operation. The Salmon Commission proposed that a witness who received notice of allegations be entitled to substantial procedural rights, including an adequate opportunity to prepare a case in rebuttal, public funding of legal expenses, an opportunity to be examined by his or her lawyer and the right to call material witnesses and cross-examine witnesses on any evidence that might affect them. In our view, a person who receives notice of allegations of misconduct should have a right to respond in the same fashion, even publicly, as those allegations were made.

Notice of allegations could ordinarily be made at an early stage of the proceedings if the commission counsel and her staff have interviewed thoroughly the witnesses they intended to call in public proceedings. Only extensive interviewing of potential witnesses, including the development of "will say" statements would place commission counsel in the position to give notice of allegations and disclosure of the nature of those allegations. No less is required to ensure fairness to individuals whose reputations might be placed in jeopardy by other witnesses making allegations against them in public proceedings. Notice of allegations would not in itself carry any stigma because it is only a notice of what other witnesses are likely to say. It would not mean that the commission had given any credit to such allegations. Accordingly, the Commission recommends that, where a commission believes that a person will be subject to serious allegations of misconduct in public proceedings of the inquiry, the commission should give the person notice of such allegations. Notice of an allegation of misconduct should include the substance of the allegation and, where appropriate, any relevant evidence. Moreover, notice of an allegation of misconduct should be given at the commission's earliest convenience. The Commission further recommends that a person receiving notice of an allegation of misconduct should have a right to respond and, in the commission's discretion, personally or by counsel, to cross-examine witnesses and call witnesses on matters relevant to the allegations of misconduct.

Even though we propose a new right to receive notice of allegations, where such notice has not been given, notice should still be given before a commission makes a finding of misconduct. As has been noted, the range of such findings

has been narrowed by *Re Nelles and Grange*.[78] However, even if a commission cannot express any conclusions of civil or criminal liability, it might still make findings that would bring discredit on a individual in the eyes of reasonable persons. It is important that such a person receive advance notice of such a finding, including a summary of the evidence upon which the commission bases its conclusions and an opportunity to respond. It is important to remember that a person criticized in the report of a public inquiry is not able to appeal such an adverse finding.

Section 5(2) of the present Act[79] is ambiguous about whether a person who will be found by an inquiry to have engaged in misconduct has a right to respond. It contemplates that a person who will be found in a report to have engaged in misconduct would have had "full opportunity during the inquiry to be heard in person or by counsel." It does not necessarily ensure that the person being criticized either knows the case against him, or has had an opportunity to respond. In our view, the Act should ensure that these basic elements of fairness are met before a person is criticized in a report. The Commission recommends, therefore, that a commission should not make a finding of misconduct against a person without giving the person prior notice of the misconduct, unless the person has already received notice of an allegation of such misconduct in accordance with our earlier recommendation. Notice of misconduct should include the substance of the misconduct and a summary of the evidence relied upon by the commission. Moreover, a person receiving notice of misconduct should have a right to respond. The Commission further recommends that, for the purposes of the above recommendations, "misconduct" should be defined as any finding or conclusion that could reasonably be construed as bringing discredit on an individual.

The orders in council appointing some recent Ontario inquiries have provided that they should not express any conclusions of criminal or civil liability. These provisions added in an *ad hoc* fashion to the mandates of some, but not all, inquiries have now been elevated, arguably, to a constitutional requirement with the decision in *Re Nelles and Grange*.[80] In our view, this restriction on the activities of commissions should be codified in the Act. There is no reason why all commissions should not be bound by this restriction or why its presence should be left to the drafting of terms of reference on a case by case basis. Accordingly, the Commission recommends that a commission should not be permitted to express any conclusion of law regarding the civil or criminal responsibility of any individual or organization.

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78 *Supra*, note 1.

79 *Public Inquiries Act*, *supra*, note 3.

80 *Supra*, note 1.

(d) ADMISSIBILITY OF EVIDENCE

One of the dangers of public inquiries is that they hear evidence that would not be admissible in a court of law. We do not believe that public inquiries should be bound by the rules of evidence that govern civil or criminal proceedings. The nature of much research into the social sciences makes it inevitable that it will contain material that will be classified as hearsay or opinion evidence under the rules of evidence. Sometimes the mandate of inquiries will make hearsay evidence directly relevant to their task. We have concluded, therefore, that it should be made clear that a commission should not be bound by the rules of evidence, including the rules concerning hearsay and opinion evidence, and we so recommend.

At the same time, however, it should be made clear that not all evidence should be admissible in public proceedings of public inquiries. Section 11 of the present Act[81] provides that "[n]othing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence". As discussed in chapter 2, this provision allows the evidentiary protections in public inquiries to evolve with those in the law of evidence and, in our view, should be retained.

Although the introduction of the rules of evidence in public inquiries would not be workable, it should be made clear that each commission has a discretion to rule evidence inadmissible in their proceedings. The commission itself retains a discretion to limit evidence that would be unduly prejudicial. Each commission should balance factors such as the necessity for hearing the facts, the seriousness of the allegation and the reliability of the evidence tendered. Accordingly, we recommend that a commission should have the discretion to disallow the introduction of evidence or cross-examination if it determines that the relevance of the evidence or cross-examination would be outweighed by its prejudicial impact.

4. THE INDEPENDENCE OF PUBLIC INQUIRIES

As discussed in chapter 1, the independence of public inquiries from the executive and legislative branches of government is perhaps their most important and distinctive attribute as an instrument of government. Obviously, this independence is not absolute. Public inquiries are appointed by the executive and it is the executive that sets the terms of reference for the inquiry and selects the

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81 *Public Inquiries Act, supra*, note 3.

commissioners. The executive often retains some degree of control over the expenses of commissions. It might also be appropriate for the executive to establish a date by which a public inquiry must deliver its report.

Although the independence of public inquiries is not absolute, its central features should be protected. If they could not be protected, the case for retaining public inquiries as a unique instrument of government would be weakened considerably.

The most important attribute of a public inquiry's independence is that once appointed, the commission has complete freedom to conduct its proceedings and deliver its report for public release. Nothing could undermine the value of a public inquiry more than the spectre of a government preventing the issue of a report that it would rather not see released, or curtailing the activities of a commission. There is precedent for the legislative protection of a public inquiry's right to have its report released to the public. As discussed in chapter 5, section 14(2) of the British Columbia *Inquiry Act*[82] provides that every report the commissioners make to the Lieutenant Governor in Council shall be laid before the legislative assembly within fifteen days after the report is made or within fifteen days after the opening of the next session. In our view, it would be better to enable an inquiry to release its report directly to the public should the government not table its report in the Legislature or release it publicly within a reasonable time. In this case, the report's release would not be tied to the sitting of the Legislature. Therefore, we recommend that if within thirty days of its delivery to the Lieutenant Governor in Council, a commission's report has not been tabled in the Legislature or released to the public, the commission should have the right to release the report.

The protection of an inquiry's independence in conducting its deliberations and hiring its staff is also critical. Accordingly, the Commission recommends that a commission should have a statutory power to retain offices and appoint staff, counsel, investigators and other personnel at rates of remuneration set by the Lieutenant Governor in Council.

The issue of a commission's independence also raises the question of immunity from civil suit. Ontario is unusual in not explicitly granting commissioners some form of immunity from suit. Many provinces simply provide commissioners the same absolute immunity as that of superior court judges.[83] Others grant limited forms of immunity.[84]

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[82] R.S.B.C. 1979, c. 198.

[83] *Morier v. Rivard*, [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1.

[84] The law in the other provinces is discussed *supra*, ch. 5, sec. 5. The L.R.C.C. recommends that commissioners, commission counsel, and witnesses be granted

In our view, commissioners should be granted immunity from civil suit for the same reasons that judges are protected. Such immunity will promote independent and impartial reasoning and the drawing of conclusions. We recommend, therefore, that Commissioners should have the same immunity as judges of the Ontario Court (General Division).

5. PUBLIC PARTICIPATION IN PUBLIC INQUIRIES

As was discussed in chapter 1, the publicity and visibility of public inquiries is one of their most important attributes as a policy instrument. Open and public scrutiny is often essential to an inquiry's function. The Salmon Commission remarked as follows on the crucial role of publicity in inquiries:[85]

> Where there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up.... Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life.

As discussed in chapter 2, the present Act[86] grants a commission a discretion whether to conduct proceedings *in camera*. By requiring the commission to balance the interest in closed proceedings against "the desirability of adhering to the principle that hearings be open to the public", section 4(*b*) presents a proportionate restriction on the public's right to access to the hearings. In our view, similar balancing should be required with respect to matters involving public security (as currently recognized in section 4(*a*) of the Act), as well as with respect to the right of a person to a fair hearing, including fairness in all subsequent proceedings. Moreover, restrictions on publicity might be justified to protect the fairness of public inquiry proceedings themselves. For example, it would defeat the purpose of a determination whether the prejudice of potential evidence outweighs its benefits if submissions about this issue were required to be heard in public.

Fairness in the inquiry proceedings might mean that a publication ban on allegations is justified until the target of the allegations is given an opportunity

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immunity from defamation suits. See L.R.C.C. Report, *supra*, note 26, at 13 *et seq.* (hereinafter referred to as "Draft Act"), ss. 8 and 9.

85 Salmon Commission Report, *supra*, note 74, at 38.

86 *Public Inquiries Act*, *supra*, note 3.

to respond. The concern for fairness in other proceedings should not necessarily be governed by the minimal constitutional standards on whether a fair trial could be found and impartial jurors summoned. It should also be made clear that the commission should adopt the alternative that is least restrictive of the openness principle.

In our view, it is appropriate to establish a lower threshold to prohibit the coverage of inquiries by television, as opposed to the other media. Many have commented on the prejudice that might be incurred when thirty or sixty seconds of testimony is televised out of context.[87] A restriction on such coverage, while allowing access by other forms of media, may in some cases be a reasonable and proportionate restriction on the publicity principle.

The Commission therefore recommends that every commission should have the discretion to hold hearings, meetings, or any part of them, *in camera*, or to prohibit the publication of specified matters. The Commission further recommends that, in determining whether hearings, meetings, or any part of them, should not be open to the public, commissions should consider the effect of the publicity on (a) the ability of an individual to be treated fairly in the inquiry's proceedings or subsequent proceedings; (b) public security; and (c) an individual's privacy.

Under section 5(1) of the present Act the only person entitled to participate in a public inquiry is one who satisfies the commission that she "has a substantial and direct interest in the subject-matter of its inquiry". Such a person is granted extensive rights to participation, including the right "to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest".[88] In our view, this test for standing is too restrictive, given the importance of public participation in the inquiry process. As discussed in chapter 2, this test might be interpreted to restrict standing to those with personal, proprietary or pecuniary interests. In an earlier report we concluded that this type of standing requirement is too restrictive to govern litigation in courts.[89] It is even more inappropriate, in our view, in public inquiries. Section 5(1) is also inappropriate in policy-oriented inquiries because it ties participation to the trial-like activities of giving evidence and calling and cross-examining witnesses. Many inquiries appointed under the Act might legitimately choose not to hold trial-like, adversarial proceedings in which participants give evidence and cross-examine witnesses, and prefer instead to use consultations and meetings to solicit public input.

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87 See, for example, Sopinka, *Public Inquiries*, address to the Canadian Institute for the Administration of Justice Conference, Winnipeg (August 24, 1990), at 4-6.

88 *Public Inquiries Act*, *supra*, note 3, s. 5(1).

89 Ontario Law Reform Commission, *Report on the Law of Standing* (1989).

While the "substantial and direct interest" test is too narrow, in our view, to determine who should have a right to participate in a public inquiry, the requirement in section 5(1) of the Act that every person granted standing has the right to give evidence and to call and examine or to cross-examine witnesses is not realistic if a public inquiry is to facilitate widespread participation. This is especially the case in policy-oriented inquiries, which might not choose to have formal hearings. Even in inquiries with more formal adversarial hearings, it is not clear that every person or organization that should be entitled to be heard should be granted the right to give evidence and to call, examine and cross-examine witnesses. The problem is that, in both its test of standing and the rights it accords to those granted standing, section 5(1) is based on a trial-like model of procedure. As suggested earlier in this chapter, the right to call evidence and cross-examine witnesses might be appropriate when a person is being criticized by witnesses in a public inquiry. However, these trial-like procedural rights are not necessary to ensure that interested parties are able to participate meaningfully in the policy deliberations of an inquiry. Thus, in our view, standing rights should be granted more broadly.

Having reached this conclusion, it is necessary to consider what procedural rights should flow from the entitlement to standing. These procedural rights would depend, in large part, on the type of public inquiry that was being conducted. It might be possible to grant interested parties only the right to make written submissions to an inquiry that is policy-oriented and that might function effectively without public hearings. If an inquiry chooses to conduct oral hearings, however, it might be desirable to grant interested parties some form of oral hearing. The appropriate format could only be decided on a commission by commission basis. In some cases an opportunity to make a public presentation might be enough; in others a right to call evidence and cross-examine witnesses might be more appropriate. Accordingly, the Commission recommends that any individual or organization with a genuine interest in any matter relating to the subject matter of an inquiry should be entitled to make submissions. Moreover, the form and extent of these submissions should be in the Commission's discretion.

A broad grant of standing will not increase effective and equal public participation in the absence of the funding of such participation. This was recognized by the L.R.C.C. when it recommended that a commission be given a discretion to "pay any of the expenses or losses incurred by a person for the purpose of making representations".[90] The criteria for the exercise of this discretion was "to promote the full expression of information and opinion".[91]

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90 Draft Act, *supra*, note 84, s. 7.

91 *Ibid.*

Granting a statutory right to funding might be prohibitively expensive, or else lead to a more narrow definition of an interested party with standing. However, it should be possible for a commission to recommend, in an appropriate case, that the government pay expenses of an individual or organization that has participated in the work of a commission. In this way, if a commission's budget did not include sufficient funds to finance public participation, the commission would at least be able to make recommendations to the government that individuals or organizations be compensated. We recommend, therefore, that a commission should have the discretion, in appropriate cases, to recommend that the government pay any of the costs incurred by a person or organization for the purpose of representation before the commission.

6. EFFICACY AND EFFICIENCY

As examined in chapter 1, it is often difficult to make conclusive evaluations of a public inquiry's efficacy and efficiency because of the multiple functions that they serve. Sometimes a lengthy public inquiry is required either to develop research into a topic or to allow full public participation. Sometimes an inquiry will be designed primarily to implement legislative reform proposals; in that case it would be fair to judge its effectiveness of the basis of legislative implementation of its recommendations. At other times, the inquiry will serve more of a social function and its effectiveness can be evaluated only through a complex measurement of changes in the awareness and attitudes of policy-makers and the public. Despite these obstacles to measurement, it is important that public inquiries be as effective and efficient as possible.

The present Act[92] does not provide for a reporting date, or govern the establishment of an inquiry's terms of reference. As examined in chapter 2, the terms of reference of some recent public inquiries have established a reporting date. In our view, inquiries should be appointed with a reporting date established in its terms of reference. The establishment of such a date would help both the government and the commissioners consider what the inquiry can be expected realistically to accomplish. We recognize that in some cases these deadlines have not been met, thus requiring supplementary orders in council extending the deadline. This option should remain available although it does present some threat to a commission's independence should the government refuse to grant an extension. It should be made clear that the expiry of a reporting deadline does not render a commission null and void and that its statutory powers to ensure the public release of its reports remains. Thus, the Commission recommends that a reporting date should be imposed on a public inquiry in the order in council

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92 *Public Inquiries Act*, *supra*, note 3.

establishing its terms of reference. The Commission further recommends that reports of public inquiries should be tabled in the Legislature or before a relevant legislative committee.

Section 3 of the *Public Inquiries Act* provides that, subject to specific statutory provisions governing the conduct of *in camera* proceedings, and standing and notice requirements, "the conduct of and the procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry". Subject to the changes we have recommended to the explicit procedural provisions in the Act, we agree that each commission must be left to determine its own procedure. The subject matters and functions of public inquiries are simply too diverse to subject them to a uniform code of procedure. For example, it should be left to each commission whether to require witnesses to give evidence under oath or whether to make unsworn public submissions.

Even requiring each commission to establish and publish its own rules of practice and procedure[93] would not in our view be desirable. The procedural autonomy and flexibility of public inquiries, subject to the requirements of fair procedure, is one of its virtues, and commissions should have the opportunity to make adjustments to their procedures as an inquiry progresses. Accordingly, the Commission recommends that the conduct of an inquiry should be under the control and discretion of the commission conducting the inquiry.

It is appropriate to acknowledge the important role that commission counsel will have in ensuring that many inquiries operate in an efficient and fair manner. Commission counsel is a lawyer appointed by a commission to represent the inquiry in public proceedings. As discussed in chapter 2, there has been considerable discussion of the important role of commission counsel in the inquiry process. In general, the consensus appears to be that commission counsel should not assume a prosecutorial role in the inquiry. Commission counsel is the commissioner's lawyer and should be bound by similar standards of impartiality and fairness. Because each commission has the right and, indeed, the obligation to instruct its lawyers, commission counsel should make it clear that they do not act as partisans but have an obligation to the commission to present all evidence in a dispassionate and fair manner. If these standards are followed, we are confident that commission counsel can participate fully both in the inquiry's public proceedings and in helping the commission prepare its report.[94]

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93 This was recommended by the L.R.C.C. See Draft Act, *supra*, note 84, s. 3.

94 See, generally, Anthony and Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (1985).

Because of the importance of commission counsel thought was given to codifying the office. For example it is commission counsel and her staff who, in the normal course of proceedings, will interview witnesses before they testify in public proceedings, in part to determine whether notice should be given to individuals adversely affected by their testimony. This does not, of course, detract from the obligation of commissioners themselves to ensure the fairness of proceedings. On balance we have concluded that it would be difficult to codify the role of commission counsel. Some inquiries will not need a commission counsel, and in those that do appoint such counsel, their role might vary.

Another issue is whether the present Act provides for an effective and efficient method of judicial review. As discussed in chapter 2, the stated case procedure in section 6 of the present Act restricts the availability of judicial review. The present Act allows the commission or a person affected to challenge "the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission".[95] This has been interpreted to permit review of jurisdictional error only.[96] The predecessor of section 6 provided that any person affected could challenge "the validity of any decision, order, direction or other act of a commissioner" as well as "the validity of the commission or the jurisdiction of a commissioner".[97] As discussed in chapter 2, by granting a reviewing court an unusual latitude in reviewing any act of a commission, this latter provision enabled the courts in the 1960s to devise many of the procedural protections that were later enacted in consequence of the McRuer Report.[98]

In our view, a return to the wide form of judicial review is not warranted, given that both the 1971 reforms[99] and the reforms proposed in this report would give individuals significant procedural rights in the conduct of a public inquiry. One of the virtues of the stated case procedure is that proceedings with respect to the subject matter of a stated case are automatically stayed under section 6(4).[100] This review is an effective means to protect the rights of individuals affected by an inquiry, but it should be limited to jurisdictional error and violation of statutory and Charter rights because of the delay it imposes on the work of a public inquiry.

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95 *Public Inquiries Act, supra*, note 3, s. 6(1).

96 *Re Bortolotti and Ministry of Housing* (1977), 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A.).

97 See, for example, *The Public Inquiries Act*, R.S.O. 1970, c. 379, s. 5(1).

98 *Supra*, note 67.

99 *Supra*, note 66.

100 *Public Inquiries Act, supra*, note 3.

7. CONCLUSION

In this report the Commission has concluded that public inquiries should be retained as an instrument of government. Inquiries possess a number of unique attributes, including their independence from the executive and legislative branches of government, that make them invaluable instruments of public policy debate and formulation. We have also concluded, however, that there are a number of deficiencies in the present law governing public inquiries that should be reformed, particularly with respect to inquiries investigating wrong-doing. Most important, in our view, is the need to ensure that the public inquiry process, with its powers to compel testimony and the production of evidence and its ability to hear evidence in public that would not be admissible in a court of law, should not be permitted to affect individuals unfairly.

To this end, we have formulated several recommendations designed to minimize the prejudice and unfairness that results from the public inquiry process, without impairing the execution of their mandates. We have also made a number of other recommendations that would recognize and protect the independence of public inquiries from the executive and the Legislature, facilitate public involvement, and enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence and participation.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The conduct of public inquiries should be guided by the following principles:

   (a) The independence of public inquiries from the executive and the Legislature should be recognized and protected;

   (b) The prejudice suffered by individuals affected by public inquiries should be minimized;

   (c) Public inquiries should facilitate public involvement; and

   (d) Efforts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence, and participation.

2. All inquiries should have the same range of powers available, but an inquiry need not use all the powers available if it considers any of them to be inappropriate to the nature of the inquiry.

3. Sworn testimony given by a witness at an inquiry should not be admissible for any purpose in subsequent proceedings governed by Ontario law.

4. No person should be summoned by an inquiry to testify or produce evidence about any subject matter in relation to which an information has been laid against that person and has not been finally disposed of.

5. (1) Everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her.

   (2) The right to refuse to testify in paragraph (1) should not be available to anyone being asked to testify about the execution of official governmental duties or to any person who has received from the proper prosecutorial authorities a grant of immunity from prosecution about the subject matter of the testimony.

6. A lawful excuse for a refusal to produce any document or thing in a person's power or control should include circumstances in which the person's right of privacy outweighs the commission's interest in their production.

7. The power contained in section 16 of the *Public Inquiries Act* to apprehend and detain a person who has failed to attend at a public inquiry in accordance with the requirements of a summons should be abolished.

8. Upon the application of an inquiry, a judge of the Ontario Court (General Division) should be permitted to issue a warrant authorizing a search for any documents or things only upon showing that

   (a) the documents and things are material to the subject matter of the inquiry;

   (b) the public interest in obtaining access to such documents and things clearly outweighs the privacy interests of the individual; and

   (c) there are reasonable grounds to believe that such documents or things will not be produced before the commission in a full and accurate condition through reliance on the commission's power to summon the production of such evidence.

9. (1) Where a commission believes that a person will be subject to serious allegations of misconduct in public proceedings of the inquiry, the commission should give the person notice of such allegations.

   (2) Notice of an allegation of misconduct should include the substance of the allegation and, where appropriate, any relevant evidence.

   (3) Notice of an allegation of misconduct should be given at the commission's earliest convenience.

   (4) A person receiving notice of an allegation of misconduct should have a right to respond and, in the commission's discretion, personally or by counsel, to cross-examine witnesses and call witnesses on matters relevant to the allegations of misconduct.

10. (1) A commission should not make a finding of misconduct against a person without giving the person prior notice of the misconduct, unless the person has already received notice of an allegation of such misconduct in accordance with recommendation 9.

(2) Notice of misconduct should include the substance of the misconduct and a summary of the evidence relied upon by the commission.

(3) A person receiving notice of misconduct should have a right to respond.

11. For the purposes of recommendations 9 and 10, "misconduct" should be defined as any finding or conclusion that could reasonably be construed as bringing discredit on an individual.

12. A commission should not be permitted to express any conclusion of law regarding the civil or criminal responsibility of any individual or organization.

13. (1) A commission should not be bound by the rules of evidence, including the rules concerning hearsay and opinion evidence.

(2) A commission should have the discretion to disallow the introduction of evidence or cross-examination if it determines that the relevance of the evidence or cross-examination would be outweighed by its prejudicial impact.

14. If within thirty days of its delivery to the Lieutenant Governor in Council, a commission's report has not been tabled in the Legislature or released to the public, the commission should have the right to release the report.

15. A commission should have a statutory power to retain offices and appoint staff, counsel, investigators and other personnel at rates of remuneration set by the Lieutenant Governor in Council.

16. Commissioners should have the same immunity as judges of the Ontario Court (General Division).

17. (1) Every commission should have the discretion to hold hearings, meetings, or any part of them, *in camera*, or to prohibit the publication of specified matters.

(2) In determining whether hearings, meetings, or any part of them, should not be open to the public, commissions should consider the effect of the publicity on the following:

(a) the ability of an individual to be treated fairly in the inquiry's proceedings or subsequent proceedings;

(b) public security; and

(c) an individual's privacy.

18. (1) Any individual or organization with a genuine interest in any matter relating to the subject matter of an inquiry should be entitled to make submissions.

(2) The form and extent of these submissions should be in the Commission's discretion.

19. A commission should have the discretion, in appropriate cases, to recommend that the government pay any of the costs incurred by a person or organization for the purpose of representation before the commission.

20. A reporting date should be imposed on a public inquiry in the order in council establishing its terms of reference.

21. Reports of public inquiries should be tabled in the Legislature or before a relevant legislative committee.

22. The conduct of an inquiry should be under the control and discretion of the commission conducting the inquiry.